100381

Vol. I

TRANSCRIPT OF RECORD.

UPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922. 1923

No. [redacted]32

ILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

RIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 6, 1922.

CERTIORARI AND RETURN FILED JULY 21, 1922.

(23,812)

(28,812)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 322.

WILLIAM R. WARNER & COMPANY, PETITIONER,

vs.

ELI LILLY & COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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VOL. I.

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In the District Court of the United States for the Eastern District of Pennsylvania, December Session, 1914.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY.

Bradford & Doolittle.
Francis Rawle, Joseph Henderson.

Docket Entries.

Dec.	22, 1914.	Bill of Complaint filed.
"	22, "	Subpœna issued returnable January 11, 1915.
"	23, "	Printed copy of Bill of Complaint, filed.
Jan.	4, 1915.	Subpœna returned "Served with copy of Bill" on Dec. 23, 1914, and filed.
"	11, "	Order for the appearance of Francis Rawle, Esq., and Joseph Henderson, Esq., for defendant, filed.
"	29, "	Printed Answer of defendant filed.
Mar.	17, 1915.	Stipulation as to taking testimony and notice by Complainant of taking of depositions filed.
"	18, "	Complainant's motion for and order appointing Charles E. Riordon as Special Examiner filed.

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Apr.	3, 1915.	Depositions of E. G. Eberhardt; R. A. Whiddin; C. L. Hooper; D. B. Dunham; Louis Pink; A. D. Thorburn; Jesse E. Wilson and J. K. Lilly, on behalf of plaintiff, filed.
"	24, "	Depositions on behalf of plaintiff filed.
June	1, 1915.	Stipulation extending time for taking depositions and order of approval filed.
July	31, 1915.	Depositions of A. J. Garner; C. N. Turner; John J. Whitley; C. J. Thurman and Dr. C. A. Noriet, on behalf of plaintiff, filed.
Aug.	2, 1915.	Motion to amend Bill of Complaint, filed.
"	2, "	Order allowing amendment to Bill of Complaint, filed.
"	2, "	Amendment to Bill of Complaint, filed.

Apr. 11, 1916. Depositions of Garfield D. Merner; Henry J. Pitsyik; James W. Wilkins; B. F. Jones; Howard Henry Richards; Henry Joseph Gonzales; Clinton Gordon McCarthy; Ernest R. De Vall; William C. Kerstmann; Eugene R. Brown; Fred C. Stevenson; Ulysses S. McClellan; Oscar G. Salb and Edward Halbig, on behalf of defendant, filed.

May 10, 1916. Motion for leave to amend Answer, filed.
" 10, " Amendment to Answer filed.
" 10, " Consent to amendment filed.
" 10, " Order allowing amendment to answer, filed.

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Dec. 20, 1916. Depositions on behalf of plaintiff, filed.
" 21, " Defendant's printed record on final hearing filed.
Jan. 6, 1917. Depositions on behalf of plaintiff filed.
Feb. 26, 1917. Depositions on behalf of plaintiff filed.
May 1, 1917. Motion by defendant for leave to take sur rebuttal proofs, filed.
" 1, " Argued sur motion for leave to take sur rebuttal proofs.
" 9, " Order, Thompson, J., allowing taking of additional testimony, filed.
Feb. 19, 1918. Depositions on behalf of plaintiff filed.
Dec. 28, 1918. Order of Court continuing hearing, filed.
Mar. 5, 1919. Order of Court fixing rate for hearing, filed.
" 10, " Order of Court continuing hearing filed.
May 26, 1920. Argued.
" 27, " Hearing resumed.
" 28, " Hearing concluded.
Sept. 29, 1920. Opinion, Thompson, J., dismissing Bill of Complaint filed.
Oct. 18, 1920. Defendant's Bill of Costs filed.
" 18, " Decree dismissing Bill of Complaint filed.
Nov. 13, 1920. Assignments of Error filed.
" 13, " Petition for Appeal, filed.
" 13, " Decree granting prayer of petition, filed.
" 20, " Copy of Notice of Appeal, filed.

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" 24, " Bond sur Appeal in $2,750 with National Surety Company, surety, filed.
" 24, " Order of Court approving Bond sur Appeal, filed.
" 24, " Citation allowed and issued.
" 29, " Citation returned "service accepted" and filed.
Feb. 14, 1921. Præcipe for Transcript of Record sur Appeal, filed.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause, the Honorable Court approving, that depositions may be taken under rules 47 and 54 as follows: Those of the plaintiff to be taken and filed on or before May 15, 1915; those of the defendant to be taken and filed on or before June 15, 1915; and rebutting depositions by either party to be taken and filed on or before July 15, 1915.

J. ADDISON ABRAMS,
E. W. BRADFORD,
Counsel for Plaintiff.
FRANCIS RAWLE,
Counsel for Defendant.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

The plaintiff in the above entitled cause, by its counsel, moves for the approval of the attached stipulation of counsel for the respective parties, relative to the taking of depositions, basing this motion upon the facts set forth in the attached affidavit of counsel for plaintiff.

J. ADDISON ABRAMS,
E. W. BRADFORD,
Counsel for Plaintiff.

CITY OF WASHINGTON,
District of Columbia, ss:

Ernest W. Bradford, being duly sworn deposes and says that he is of counsel for plaintiff in the above entitled cause, and is in charge of the case for plaintiff; that on account of the inability of important witnesses to be available for examination at an earlier date, he has been obliged to give notice for the beginning of taking of depositions on March 22nd; that plaintiff's case must be established, if at
17 all, by evidence secured from witnesses residing throughout the country in widely separated localities; that as will appear by the attached copy of notice to the defendant's counsel, there are a number of such witnesses to be examined and a number of different localities to be visited for the purpose; that the extension of time as provided in the stipulation will not be unreasonable, and that it has been impossible for him to arrange for the taking of said depositions earlier.

ERNEST W. BRADFORD.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for said City and District, at Washington, D. C., this 6th day of March, 1915.

[SEAL.] A. M. PARKINS,
Notary Public, D. C.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Washington, D. C., March 6, 1915.

Hon. Francis Rawle,
Counsel for Defendant,
West End Trust Building,
Philadelphia, Pa.

DEAR SIR:

Please take notice that, pursuant to our previous oral under-
18 standing, I will on Monday, March 22, 1915, at 10 o'clock in the forenoon, at the office of Bradford & Doolittle, Rooms 1451 to 1455 Lemcke Annex, Indianapolis, Indiana, begin taking testimony on behalf of plaintiff in the above entitled cause. At the time stated, Josiah K. Lilly, A. D. Thorborn, Dr. Eberhardt and others will be examined as witnesses on behalf of plaintiff.

At the conclusion of the examination in Indianapolis, we will pro-
ed to Detroit, Michigan, where W. H. Martin, Wm. M. Merithen,
F. Knowles and others will be examined.
At the conclusion of the examination in Detroit, we will proceed
Saginaw, where B. Q. Wright will be examined.
At the conclusion of the examination in Saginaw, we will proceed
North Branch, Minnesota, where Mr. Anderson of the Anderson
rug Company will be examined.
At the conclusion of the examination at North Branch, we will
roceed to Chicago, where Mr. Morrison of the Morrison Drug Com-
ny and others will be examined.
At the conclusion of the examination in Chicago, we will proceed
other points, as may at the time be agreed upon, for the further
amination of witnesses as follows:
Mr. Joseph Wolsey, Mr. James Kinder and Dr. Geo. Walker of
ne Girardeau, Missouri; Mr. John B. Messenger, Mr. H. N. Hen-
ell, Mr. Harry W. Shuh of Cairo, Illinois; Mr. W. H. Buck, Mr.
L. Winchester, Mr. C. O. Manning, Mr. W. R. Scott and others
f Memphis, Tennessee; Mr C. H. Porter of Henning, Tennessee;
r. B. P. Moffatt of Troy, Tennessee; Mr. G. W. Madden, Mr. A. L.
elton and Mr. J. Blodau of Nashville, Tennessee; Mr. W. L.
riffin and others of Houston, Texas; Mr. F. V. Perry of Little
ock, Arkansas; Mr. Davis of Davis & Son of Warren, Arkansas;
Mr. A. Fly of New Orleans, La.; Mr. Birdsong of Yazoo City,
La.; Mr. Barnes of the McComb Drug Store, McComb City,
Mississippi; Mr. Julian Holt of Meridian, Mississippi; Mr.
ayfield of the Collins Drug Company of Collins, Mississippi; Dr.
ones of Brookhaven, Mississippi; Mr. C. G. Boyett of Ruleville,
Mississippi; Mr. C. E. Bateman of Prattville, Alabama; Mr. J. M.
oseley of Geneva, Alabama; Mr. J. B. Reed of Union Springs,
Alabama; Dr. A. L. Vaughan of Cuba, Alabama; Dr. Rowland of
rkadelphia, Alabama; Mr. J. H. Vinson and Mr. J. B. Riley of
Macon, Georgia; Mr. W. A. Jolley of Marshallville, Georgia; Mr.
Daniel Coleman of Ft. Gaines, Ga.

We will then proceed to Richmond, Virginia, to Washington,
D. C., and Baltimore, Md., where other witnesses will be examined
whose names are not now available but will be given you later.

You are invited to attend and cross-examine our witnesses.

Please take notice, further, that while the above list of witnesses,
and places of examination, are as complete as we can give at this time,
it will be my purpose to avoid the examination of such witnesses as
seem to be unimportant, or will only unnecessarily duplicate the
evidence obtained prior to reaching them. It is possible, therefore,
that a number of the witnesses herein named may not be called for
the reason that before they are reached sufficient evidence for our
purpose, along the line of their knowledge, may already have been
secured. It is also possible that when we are in any locality other
evidence, of which we have no knowledge at this time, may come to
our notice, and we shall desire to introduce it and thus perhaps avoid
extending the trip to some other locality. While we have given the
places of residence of the several witnesses as near as we can, I shall

endeavor, so far as possible, to bring the witnesses to convenient localities where proper facilities may be obtained for taking their depositions, of all of which you shall be duly informed. It is
20 not my intention to make the trip any longer, or the depositions any more numerous than may seem necessary to properly substantiate the allegations of the bill of complaint.

Yours very truly,

E. W. BRADFORD,
Counsel for Plaintiff.

Service accepted and a copy received at Philadelphia, Pa., this 17th day of March, A. D. 1915.

FRANCIS RAWLE,
Counsel for Defendant.

Before Dickinson, J.

Motion granted and stipulation approved this 18th day of March, 1915.

By the Court,

Attest:

GEORGE BRODBECK,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

21 The plaintiff in the above entitled cause, by its counsel, moves for the appointment of a Special Examiner to take depositions on behalf of plaintiff in the above entitled cause, and nominates Mr. Charles E. Riordon, of Washington, D. C., for such appointment.

Counsel for plaintiff has known Mr. Riordon for more than fifteen years as a thoroughly competent and trustworthy Examiner and Notary Public, and one who has had large experience in such work and also in various forms of legal reporting. He is an Attorney at Law and familiar with the forms and rules of the court, in addition to his qualifications as a rapid and competent stenographer, typewriter and Notary Public.

Respectfully submitted,

E. W. BRADFORD,
Counsel for Plaintiff.

I consent to the appointment above requested.
FRANCIS RAWLE,
Counsel for Defendant.

Before Dickinson, J.

Pursuant to the agreement of Counsel, the above motion is granted and the appointment of Mr. Charles E. Riordon, as a Special Examiner in Chancery, with authority to administer oaths and take the depositions of witnesses on behalf of complainant, in accordance with law, is hereby made and it is so ordered.
March 18th, 1915.
By the Court,

Attest:
GEORGE BRODBECK,
Deputy Clerk.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

Testimony taken on behalf of complainant in the above entitled cause pursuant to notice to counsel for defendant and also pursuant to stipulation by and between counsel for the respective parties, approved by the Court, before A. C. Rice, a Notary Public, at the office of Bradford & Doolittle, Rooms 1451-55 Lemcke Annex, Indianapolis, Indiana, beginning at ten o'clock a. m. Monday, March 22, 1915.

Present:

Mr. E. W. Bradford for complainant.
Mr. Francis Rawle for defendant.

Counsel for complainant offers in evidence a certified copy of the Certificate of Incorporation of The Eli Lilly and Company and marks the same "Complainant's Exhibit, Document No. 1."

Mr. ERNEST G. EBERHARDT, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford testifies as follows:

Q. 1. Please state your name, age, residence and occupation?

23 A. E. G. Eberhardt. 50 years. My occupation I always give for the City Directory as Chemist, Eli Lilly & Co. but I am in charge of the administrative work of the Scientific Division for that concern.

Q. 2. How long have you been employed by Eli Lilly & Co.?

A. Since 1886. 29 years next June.

Q. 3. Do you know anything concerning the manufacture by Eli Lilly & Co. of a product known as Coco-Quinine? If so, will you please give, in narrative form, the history of said product so far as you know it?

A. Well, I know a great deal about that. As a matter of fact, I am the man who worked out the process for its manufacture. Towards the close of 1899 I received instructions from Mr. J. K. Lilly to prepare a syrup containing quinine which would be as palatable as I could make it, to be put upon the market as a liquid preparation of quinine and in the development of the work I finally worked out the product which they are now marketing as Coco-Quinine. I can say this, of course, that the work that I first did was not anything like the product we now have on the market. The first attempts were the mere mixture of Quinine Sulphate with syrup and with Yerba-Santa as a disguisant for the bitterness. Previous to that time Eli Lilly & Co. had been marketing a syrup under the name of Yerbazin which contained Yerba-Santa and was put upon the market as a vehicle for quinine in prescriptions. In the original work this syrup Yerbazin was used as one of the ingredients in the preparation we were trying to work out and later the idea of adding chocolate came to the write as a means of giving a distinctive color and a characteristic appearance and furthermore to keep in better suspension the material in the preparation. The work of finally getting the formula where it would be a thoroughly satisfactory and stable product extended over some time. The main portion of that work as I recall, was done in the early
24 part of 1900 when the preparation had already been placed on the market. I recall one series of experiments that was kept under observation one year. The early history was not very encouraging, because of numerous difficulties that developed and the experiments I spoke of were made to overcome these difficulties. I think that fairly well covers the history of the preparation.

Mr. Rawle: Counsel agreeing that objection can be made at the end of the answer, if desired, counsel for defendant objects to so much of the answer as relates to steps prior to the making of the precise preparation which is referred to in the Bill of Complaint for the reason that the Bill of Complaint sets up no monopoly for exclusive right in such preparation.

Q. 4. When, so far as you know, was the product placed on the market under the name "Coco-Quinine"?

A. I could not state the date definitely. I know, however, that my work was done somewhere near the close of 1899 and I know that in that Winter the product was placed on the market under the name of Coco-Quinine. It was never on the market under any other name. I know this, that it was placed on the market just as soon

the house could do it, rather a little hastily and really before the rking formula had been tried out sufficiently long, by aging the oduct to be sure that all difficulties had been eliminated.

Q. 5. Have you any means of refreshing your memory as to these tes? If so, what?

A. Well, I don't know as I would have. It might be in a record the experimental work done which I wrote up after the work was one and which has some dates, but that record wouldn't tell us when he product was first placed on the market.

Q. 6. I hand you a paper and ask you what this is?

A. That is the record I spoke of that I wrote up.

Q. 7. Is that the original record?

25 A. That is the original record that I wrote in the book in which I entered the experimental work that I was doing at that time.

Q. 8. When was that written by you?

A. That was written in 1900. I don't know the exact date but it was written after these experiments had been under way for some time. The original record was kept on paper where my notations were made and then it was entered in the book later on.

Q. 9. What are the dates appearing on that record?

A. The first date here is March 23rd, 1900, and the next was March 26, 1900, when a series of experiments were started.

Q. 10. Please read the first paragraph of the paper you hold in your hand.

A. The first paragraph is headed Quinine Syrup and relates to the first part of the work.

A series of experiments were made using as a base Yerbazin (uncolored); Yerbazin 3 & Syr. 1; and Yerbazin 1 and syrup 1 with quinine alkaloid, quinine sulphate and quinine tannate respectively. It was found that the alkaloid was the most and the tannate the least bitter. Also diluting the Yerbazin tended to develop the bitterness. To give a distinctive color both Cudbear and Carmine were used. It occurred to the writer that a syrup containing chocolate would give both a distinctive color and an elegant flavor. Accordingly, the following were tried. Then goes on and gives a record of experimental work.

Mr. Rawle: Same objection.

Q. 11. Please state what the paper I now hand you is.

A. It is evidently a photo-lithograph of the paragraph I have read.

Q. 12. In your own handwriting?

A. It is in my own handwriting.

Counsel for complainant offers in evidence the paper con-
26 taining copy of the paragraph read and marks the same "Complainant's Exhibit Document No. 2."

Q. 13. In the copy of your memorandum which you have read, I note that it is stated that the chocolate would give both a distinctive color and an elegant flavor to the product. Was the chocolate added for this purpose?

A. That was the purpose of adding the chocolate to make a preparation that would be totally different from anything I knew of, and in fact it was a new departure as far as I was aware in pharmaceutical preparations.

Q. 14. As a chemist, can you state whether or not other syrups than chocolate might be employed for the same purpose as the chocolate syrup was employed in this preparation?

Mr. Rawle: Same objection.

A. There is no question about that because the preparation as a syrup was made up in an experimental way before the chocolate idea developed. That is to say, that a liquid preparation in which the bitterness of the quinine was disguised was made up before the chocolate idea was developed.

Q. 15. Please name over other syrups which, in your opinion might be employed in this preparation to give it a distinctive color and a distinctive taste?

Mr. Rawle: Same objection.

A. Well, you could use anything for that purpose that would be agreeable. You could flavor it with vanilla, you could flavor it with orange, you might flavor it with any sort of flavor that you might desire. You could add any coloring matter that you might desire. You might color it brown with caramel, or red with carmine, or any other desirable color. The essential point is that Yerba-Santa be present in order to disguise the bitterness.

27 Q. 16. Have you any of the product made, omitting the chocolate from the preparation?

Mr. Rawle: Same objection.

A. Yes, I have had experiments made containing the other ingredients, except the chocolate and also the reverse containing the chocolate and other ingredients with the Yerba-Santa omitted.

Q. 17. Have you samples of such preparations with you?

A. Yes, I brought two.

Q. 18. Will you please produce them?

Witness produces a bottle and hands the same to counsel.

Q. 19. Please state what this bottle contains?

Mr. Rawle: Same objection.

A. This is a sample of the product containing the Yerba-Santa and the other ingredients, but not the chocolate.

Complainant offers the bottle in evidence and marks the same "Complainant's Exhibit, Bottle No. 1."

Mr. Rawle: Same objection.

Witness also produces another bottle and hands the same to counsel.

Q. 20. Please state what this bottle contains?

Mr. Rawle: Same objection.

A. That is a sample of the preparation containing all the ingredients of Coco-Quinine with the Yerba-Santa omitted.

Complainant offers said bottle in evidence and marks the same "Complainant's Bottle No. 2."

Mr. Rawle: Same objection.

Direct-examination Closed.

28 Cross-examination.

By Mr. Rawle:

X Q. 21. Was the formula for the preparation as you made it when you first put it out, the same precisely as it is now?

A. As it was first marketed?

X Q. 22. Yes, if you choose to put it that way.

A. I would say, essentially it is the same. There may have been minor changes in the proportion of some of the ingredients.

X Q. 23. Can you mention any minor changes in the ingredients?

A. I recall one at this time, that is, the proportion of chocolate was changed somewhat later for the reason that we put in too much at first and it produced thickening in the product and we had to reduce the amount.

X Q. 24. What I am asking you about is whether subsequent to first putting it on the market you took out any ingredients and substituted others or put in any ingredients that had not at first been present?

A. I think not.

X Q. 25. You have said that Quinine could be made into a preparation with caramel or carmine or chocolate or Yerba-Santa or orange or vanilla. Do you know of any preparations now on the market made by other houses which are made up with any of those various ingredients, added for the sake of disguising the bitter taste of the quinine?

Mr. Bradford: Counsel for complainant objects to the question as not justified by the witness' testimony, witness having not stated that either of the syrups in question is used or can be used for disguising the bitterness of the quinine except the one called Yerba-Santa.

A. I am not familiar at this time with what is on the market and just at this time I can't recall any preparation containing
29 quinine prepared in that way, but I do know that syrups have been put out as a vehicle without the Quinine, which was to be added later on by the physician or the druggist, which were colored in various ways. I spoke of Yerbazin which is put out by Eli Lilly & Co. which is colored and I recall a similar product

under the name of Quinimel, which was colored red, as I remember, I think marketed by a former house of Searle & Hereth. Further than that, I don't recall any products at this time.

X Q. 26. I understand your last answer to refer only to syrups or such like preparations intended to be made up apart from the quinine and to be administered with the Quinine by the doctor or the druggist. Is that correct?

A. That is correct.

X Q. 27. Have you personally had practical experience covering any considerable length of time with a preparation made up of Quinine and other syrups not containing chocolate?

A. My experience in that respect was limited to the work I did in developing the formula for Coco-Quinine. I think I stated that the first experiments that were made up were made up without chocolate but they contained quinine. Previous to that I had frequently made mixtures of Yerba-Santa with Quinine.

X Q. 28. I understood you to say that these were laboratory experiments.

A. Yes, sir.

X Q. 29. Will you please state whether preparations of Yerbazin and the one you call Quinimel have not been intended for extemporaneous mixture with the Quinine at the time of administering the Quinine?

A. That was the purpose, as I know the preparations they were merely vehicles and sold as such with the idea that the Quinine be added in whatever proportion that the physician might choose.

X Q. 30. And this addition of Quinine to the other preparations respectively was intended to be at the moment of administering the dose substantially?

A. Well, I would hardly say that it was at the time of administering the dose. Usually these products were prescribed and the mixture would be made by the druggist who filled the prescription.

X Q. 31. In the Coco-Quinine preparation, which you have been talking about, doesn't the chocolate aid in disguising the bitterness of the Quinine and holding the Quinine in suspension?

A. The chocolate plays no part in disguising the bitterness but it does aid, to some extent, in holding the Quinine in suspension, as any other thickening agent would do.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 32. Are your duties such that you would naturally be posted as to all products of this character that might now be on the market?

A. No, I would say not. Casually I might learn of them.

R. D. Q. 33. As I understand your answer to Mr. Rawle, the products known as Yerbazin and Quinimel after being mixed with Quinine by the druggist in accordance with the physic-an's pre-

scription, may be taken by the patient as other prescriptions are taken, that is from time to time until the quantity is used up? Is this correct?

A. That is correct.

R. D. Q. 34. It is not then necessary that the Yerbazin and Quinine or Quinimel and Quinine must be used at the moment the compound is made?

A. No, that is not necessary.

Redirect examination closed.

31 Recross-examination.

By Mr. Rawle:

R. X Q. 35. Would you say that a mixture of Yerbazin and Quinine disguises the bitter taste of the Quinine, as well as your Coco-Quinine?

A. Undoubtedly it does, so far as disguising the bitterness solely is concerned, apart from the flavor.

R. X Q. 36. What do you mean by "apart from the flavor?"

A. The disguising of the bitterness and the imparting of a flavor are really not exactly one and the same thing, only in so far as the Yerba-Santa itself gives a flavor.

R. X Q. 37. You are not very clear to me. If Yerba-Santa imparts a flavor does it not necessarily disguise the bitterness in so far as it does impart a flavor?

A. The Yerba-Santa has the property of disguising the bitterness of the Quinine and it also possesses characteristics aromatic properties.

R. X Q. 38. What is the predetermination or ruling flavor of your Coco-Quinine? Is it chocolate or Yerba-Santa to the person who tastes it with a trained palate?

A. That might be a matter of personal opinion. The chocolate certainly gives it a distinctive flavor as well as a color.

R. X Q. 39. But what I want you to answer is, whether the chocolate does not disguise the taste of the Quinine?

A. I will answer that by saying this. That the Quinine Sulphate mixed merely with a syrup containing chocolate and no Yerba-Santa is very bitter, which shows that it does not disguise the bitterness.

R. X Q. 40. Now I ask you whether the chocolate doesn't aid the Yerba-Santa in disguising the bitterness?

A. No, sir.

R. X Q. 41. How permanent a preparation, in lasting qualities, would a mixture of Yerbazin and Quinine be?

32 A. It would be as permanent as any pharmaceutical preparation of that character ordinarily is.

R. X Q. 42. And how permanent is that?

A. Under ordinary conditions, it would keep for an indefinite length of time.

R. X Q. 43. Can you say that such a preparation would be a stable

and satisfactory preparation for the purpose of putting on the market?

A. It certainly would.

Deposition closed.

E. G. EBERHARDT.

Mr. RAY A. WHIDDEN, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford testifies as follows:

Q. 1. Please state your name, age and occupation.

A. Ray A. Whidden. Thirty-seven. 204 West Randolph St., Chicago, Ill. Manager, Chicago Department, The Eli Lilly and Company.

Q. 2. How long have you been employed by the Eli Lilly & Company, and where and in what capacity?

A. I will have to give the approximate date as I don't recall the exact date when I was employed. About seven years ago I was engaged by Eli Lilly and Company to travel in the States of Oregon and Washington. After two years was transferred to the City of San Francisco and I covered the San Joaquin Valley and later acted as City Salesman in San Francisco, California. At times acting as assistant to Mr. R. B. Zane, Manager of the Pacific Coast Department. My duties at that time were sales work in the City of San Francisco and assisting in coaching practically all of the salesmen employed by Eli Lilly & Company in the Pacific Coast Department. March 1st, 1914, I was transferred to Chicago as Manager of the Chicago Department.

33 Q. 3. I hand you a paper and ask you if you have ever seen same before and if you have, when and what it is.

Mr. Rawle: Objected to as immaterial.

A. Yes, sir. This is a list of substitutes and competing preparations manufactured by Wm. R. Warner & Co. that was turned over to me in April, 1912, by Mr. C. L. Hooper.

Mr. Rawle: The answer is objected to as the witness is in no position to say what was the purpose of Mr. Hooper in turning it over to him. The paper must necessarily speak for itself.

Q. 4. Who is Mr. C. L. Hooper and what position did he occupy at the time he turned this list over to you?

A. Mr. C. L. Hooper was the local representative in San Francisco and Central California for Wm. R. Warner & Co. who resigned some time in March, 1912 and was engaged by Eli Lilly & Co. and was turned over to me to coach and instruct in sales work for Eli Lilly & Co.

Mr. Rawle: Question and answer objected to as immaterial.

Q. 5. I show you a bottle and ask if you recognize the same and what it is?

A. I do. This bottle of Quinimel was purchased this month by me through the regular drug channels in Chicago.

The bottle in question is offered in evidence and marked "Complainant's Exhibit Bottle No. 3."

Mr. Rawle: Objected to as immaterial.

Direct-examination closed.

Mr. Rawle: No cross-examination.

Deposition closed.

RAY A. WHIDDEN.

34 Mr. CHARLES L. HOOPER, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Charles Leonard Hooper. 29 years old. Portland, Oregon. Traveling Salesman for Eli Lilly & Co.

Q. 2. How long have you been so employed by Eli Lilly & Co.?

A. Three years this coming first of April.

Q. 3. By whom were you employed prior to that time?

A. By the Pfeiffer Chemical Company of St. Louis.

Q. 4. In what capacity were you employed by the Pfeiffer Chemical Company, and where?

A. I was employed as a traveling salesman in the territory from Bakersfield, California, North to Ukiah, California.

Q. 5. I hand you a document and ask you if you have ever seen it before and if so, what it is?

A. Yes, sir, I have seen that document before. I received that from the Pfeiffer Chemical Company, giving names of preparations that the Pfeiffer Chemical Co. made that were the same as competing preparations.

Mr. Rawle: Same objection.

Q. 6. Please explain, if you can, anything that you know relative to the preparation known as Coco-Quinine, a product manufactured by Eli Lilly & Co. and the substitute product known as Quin-Coco sold by the defendant, Wm. R. Warner & Co. herein?

Mr. Rawle: Question is objected to because of the use of the words "substitute product" and because it is too general in scope and is immaterial.

35 A. In the capacity as a representative for the Pfeiffer Chemical Co. I received instructions from Mr. F. C. Stevenson who was representing the Pfeiffer Chemical Co. to sell Quin-Coco as a substitute product for Coco-Quinine, that being the only way that we could sell Quin-Coco as there was no demand at all for Quin-Coco. In making my sale of Quin-Coco I told the druggist that it was exactly the same as Coco-Quinine made by Lilly & Com-

pany and that Quin-Coco would cost the druggist less money. And that on a physician's prescription for Coco-Quinine, he could use Quin-Coco, the products were so similar that he need not be afraid of detection. In this manner we disposed of quite an amount of the Quin-Coco. The physicians in my territory to the best of my knowledge did not write for Quin-Coco on prescription. After leaving the Pfeiffer Chemical Company and joining the sales force of Eli Lilly & Company, going over the same territory, with Coco-Quinine, soliciting sales for Coco-Quinine, the druggists asked me if in selling Coco-Quinine I felt consistent in my previous statement that the product Quin-Coco was the same as Coco-Quinine? Several doctors who were prescribing Coco-Quinine, thinking that they were getting Coco-Quinine, in reality were getting Quin-Coco. A Dr. Weaver of Visalia told me that he was prescribing Coco-Quinine in large amounts. When interviewing the druggists Huntoon & Douglass, asking them if they were wanting any Coco-Quinine, they replied: They had plenty in stock, that they bought it in big quantities. I asked them where they got it. They said from the Pfeiffer Chemical Co. That they could buy it cheaper from the Pfeiffer Chemical Co. than they could from Lilly & Co. I wrote Eli Lilly & Co. advising them to write the Doctor that there was an imitation product of Coco-Quinine on the market and to suggest to him that he made sure that he got Coco-Quinine. In
36 the State of Oregon, three druggists, The Medford Pharmacy, Medford, Oregon, The Hillsboro Pharmacy, Hillsboro, Oregon, Yerrington & Allen of Eugene, Oregon, were three druggists using Quin-Coco. I told the druggists that if they didn't discontinue using an imitation product for our specialty Coco-Quinine, I would inform the doctors.

Mr. Rawle: The question is objected to, the answer is objected to as a whole. Whatever is hearsay is objected to as hearsay. The testimony of the witness as to groups of persons who are stated by him to have said or done certain things are objected to; the statements of witness to other persons is objected to; so much of the answer as states what other persons said to the witness, is objected to.

Mr. Bradford: An endeavor will be made to clear up such points of uncertainty and to bring out definitely as possible, the matters related by witness and covered in a general way.

Q. 7. Have you personally seen the prescriptions written by physicians for the product in question, and if so, how were such prescriptions written?

Mr. Rawle: Objection is made to the question which calls for the contents of a physician's prescription, unless the prescription is produced.

A. I have seen a prescription written by a Doctor, in Hillsboro, for Coco-Quinine. The prescription was filled with Quin-Coco.

Mr. Rawle: Objected to because the act of the physician referred to his prescription and the act of the druggist in filling the same does not bind or in any way affect the defendants in this case.

Q. 8. How do you know this?

Mr. Rawle: Objected to because the act of the druggist in filling the prescription referred to in the question cannot in any way bind or affect the rights of the defendants.

A. I was behind the prescription case just after having left the Doctor. Dr. Bailey. Mr. Paine was the party filling the prescription.

Q. 9. How do you know that Mr. Paine used the product known as Quin-Coco, instead of the Lilly Coco-Quinine, called for by the prescription?

Mr. Rawle: Same objection.

A. The product was taken from a gallon bottle of Quin-Coco. The druggist had to fill the prescription with Quin-Coco, because he hadn't any Coco-Quinine. I spoke to him about it and told him that when that gallon was emptied, if he purchased any more I would be compelled to inform the Doctor.

Mr. Rawle: Objected to because the threats of the witness to the druggist are not relevant to the issue between these parties.

Q. 10. Will you please tell us something more relative to the document to which I called your attention at the beginning of the deposition and how you are able to identify it as one that came to you from the Pfeiffer Chemical Company?

A. I can identify the document by the notations made by myself on the bottom of the 3rd page.

Q. 11. Were those notations in your own handwriting?

A. Yes, sir.

Q. 12. What was your understanding of the information given near the bottom of page 1 of this document, relative to Coco-Quinine, in the first column and Quin-Coco in the second column?

Mr. Rawle: Objection to the question upon the ground that the paper handed to the witness speaks for itself and because the understanding of the witness is irrelevant and immaterial.

A. I understood from the document that Quin-Coco was a substitute preparation for Coco-Quinine.

Q. 13. Did Mr. Stevenson, to whom you have before referred make any statement to you as to this document?

Mr. Rawle: Objection to the question upon the ground that statements by Mr. Stevenson to the witness are irrelevant to this issue.

A. Yes, sir.

Q. 14. What were they?

Mr. Rawle: Same objection.

A. Mr. Stevenson told me in my leisure moments to study up an get posted on competing preparations.

Q. 15. What did he say, if anything, relative to the Coco-Qui nine?

Mr. Rawle: Same objection.

A. That to go ahead and sell Quin-Coco for Coco-Quinine, as was the same and cost the druggists less money.

Mr. Bradford: The document in question is introduced in ev dence and marked "Complainant's Exhibit Document No. 3," th same being the identical document referred to in the deposition the previous witness, Mr. Whidden.

Mr. Rawle: Objection is made to the offer as irrelevant and imm terial.

Q. 16. When, if you can state, did you receive this document N 3 from the Pfeiffer Chemical Company?

Mr. Rawle: Same objection.

A. As to the date, I don't know. I had about three of those doc ments. I guess I wore one out and I sent for more and that ma have been one of the last two that I received.

Q. 17. Can you state approximately when this was receive

39 A. No, sir, I cannot state when I received this documen I received the first document which was the same as th one, about four years ago.

Direct-examination closed.

Cross-examination:

Mr. Rawle, reserving all objections heretofore made to the tes mony of this witness, cross-examines as follows:

X Q. 18. You testified that Mr. Stevenson told you in your leisu time to get posted on competing preparations. This blue list, as understand it was a list of competing preparations, was it not?

A. Yes, sir.

X Q. 19. And you were directed to study up those competin preparations, was that right?

A. Yes, sir.

X Q. 20. And that is what you mean by "substitute?"

A. No, sir. I mean by "substitute" preparations those that a exactly the same insofar that the doctor can't tell the difference.

X Q. 21. You mean can't tell the difference by taste or by lookin at it or what?

A. From a physical appearance.

X Q. 22. But doctors could tell the difference if he looked at th labels, couldn't he?

A. Yes, sir.

X Q. 23. And you mean that the druggists could not tell the difference in physical properties between the two?

A. The druggist could not tell the differenc between the two products from their physical appearance.

X Q. 24. From your experience in traveling for the Pfeiffer concern or, the Lilly concern, are there a great number of products sold by each which are so similar in physical properties, taste, etc., that a druggist could not tell the difference between them, irrespective of the package or label?

Mr. Bradford: Objected to as immaterial.

A. In the Lilly products we have nothing "the same as" a competing preparation. In selling pharmaceuticals for the Pfeiffer Chemical Company, I have made the statement that the product I was selling was exactly "the same as" the competing product from a physical and therapeutic standpoint.

X Q. 25. Do you mean to say that selling for Lilly you sold or offered for sale no preparation which competed with the preparations of other concerns?

A. We have emphatic instructions from Lilly & Co. that we have nothing "the same as" or "just as good" as a competing product. The preparations we list might differ in physical appearance but the therapeutic effect may be what the physician is desiring. In such a case, we detail the doctor on a product that is similar, soliciting his specification for the Lilly label.

Mr. Rawle: The answer is objected to as volunteered and irresponsive and the question is repeated.

A. The word competition as used in that question is rather vague. The products made by Eli Lilly & Co., and Lilly & Company, are competitive to all products and houses.

X Q. 26. Is that answer clear to your mind.

A. Perfectly.

X Q. 27. When you were selling preparations for any Pharmaceutical house, isn't it part of your equipment as a saleman to know what preparations are being sold by other pharmaceutical houses, so that you can talk intelligently to the proposed buyers of your preparation?

A. It is the policy of the salesman to know a little about the other fellow. In my capacity as salesman for Lilly I devoted all my time to knowing my own line irrespective of competition.

X Q. 28. I understand that the blue list marked "Exhibit 7" is intended to give information to a salesman as to what is being done by various pharmaceutical houses, is it not?

A. Yes, sir.

X Q. 29. Hasn't the Lilly house given you any information either in print or otherwise as to what other pharmaceutical houses are doing in the way of selling preparations?

A. No, sir. By that do you mean competing preparations?

X Q. 30. You can answer the question on the basis that I meant competing preparations, if you wish.

A. No.

X Q. 31. Why then did you ask me why I referred to competing preparations?

A. Because Lilly & Company make preparations that other houses make and if the other fellow is or isn't selling a certain product, we get busy and sell.

X Q. 32. And if the other fellow is selling a competing product, then what?

A. Then we get busier.

X Q. 33. Then there are products of Lilly which compete with products of other concerns, are there not?

A. Yes, sir. Provided that the other fellow's product is competing with Lilly's. If I might give a case in point of my statement. Pituitary Extract in Ampules is sold by practically every pharmaceutical house in the world. Medical journals are enthusiastic over its results. We are given instructions to sell the above product while the physicians are in such a state of mind. That is what I mean by competing.

X Q. 34. Is it not true that the plaintiff, Eli Lilly & Co. sell only to jobbers?

A. To the best of my knowledge, Eli Lilly & Co. sell only to the jobbing trade.

42 X Q. 35. Then your answer to my last question is "Yes?" Is that correct?

A. Yes, sir. If you say jobbing trade, it is correct, drug jobbers.

X Q. 36. When you spoke of someone named Paine having mixed a prescription, was Paine the druggist or in the employ of the druggist?

A. Paine is a partner in the firm. McPhetter & Paine are the firm and the Hillsboro Pharmacy is the title of the company.

X Q. 37. Where was Hillsboro?

A. Hillsboro, Oregon.

X Q. 38. Are you not furnished by Lilly & Co. with any printed matter setting forth preparations that are on the market and are being sold by other pharmaceutical houses?

A. No, sir.

X Q. 39. If you haven't had printed information as to what your competitors are doing sent you by the Lilly concern, have you had letters or oral communications from them giving you such information as to what your competitors are doing?

A. I have had letters from the house mentioning our competitors at various times.

X Q. 40. Have you been, while employed by Lilly as salesman, in the habit of calling on physicians to ask them to prescribe Coco-Quinine and thereby creating a market for it?

A. I have called on physicians, leaving them a sample of Coco-Quinine and asking them to try it out and if they liked it and they got results from it, to write prescriptions for it.

X Q. 41. Have you done this very commonly and very frequently and as a regular part of your business, as a salesman?

A. Yes.

X Q. 42. And that creates a market for the product which you are placing before the physician, does it not?

A. It does.

X Q. 43. And that is a legitimate way to create a market for anything that you are selling, is it not?

A. It is.

X Q. 44. And if any given physician has been using Quin-Coco or any other compound of cocoa and quinine instead of using Lilly's, what is your argument with him?

A. I have never had occasion to argue with a physician as no physician, to my knowledge has prescribed, when wanting Coco-Quinine, any other product.

X Q. 45. What I want to know is this. Have you run across physicians who have been using Quin-Coco or any other preparation of Cocoa and Quinine and have you thereupon talked with such physician about the propriety of using Coco-Quinine made by Lilly?

A. I have never run across a physician using Quin-Coco.

X Q. 46. Or any other product of Cocoa and Quinine except Lilly's.

A. Yes, that's the idea.

X Q. 47. What has been your territory during all of your employment by Lilly?

A. Bakerfield, California to Portland, Oregon. Bakersfield is about the middle of the State of California.

X Q. 48. You mean the Northern half of California up to Portland, Oregon?

A. Yes.

X Q. 49. How often did you see Mr. Stevenson and talk with him? More than once?

A. Yes, sir. I have seen Mr. Stevenson about twice.

X Q. 50. Where?

A. San Francisco and Sacramento.

X Q. 51. At which of the interviews did he tell you what you have said above that he told you.

A. At San Francisco.

Q. When was it?

A. When he engaged me to represent the Pfeiffer Chemical Company.

X Q. 53. Did he ever write you anything to that same effect?

A. No, sir.

X Q. 54. Did you ever communicate with the Home Office on that subject?

A. No, sir.

X Q. 55. Did you ever get any letter from the Home Office to the effect that Quin-Coco was the same product as Coco-Quinine?

A. No, sir, I did not.

X Q. 56. Did you ever get any letter or have any communication from the Home Office to the effect that any Pfeiffer Chemical preparation was exactly like any competing preparation?

A. Never received any communication from the Home Office to that effect.

X Q. 57. To make it perfectly clear, I now ask you whether all the instructions that you got when you went into the employ of the Pfeiffer Chemical Company in regard to competing products were from Mr. Stevenson?

A. Yes, sir.

X Q. 58. Did you in this connection ever have any written or other communication with Wm. R. Warner & Co. with regard to competing preparations?

A. Not to the best of my knowledge have I received any communication from Wm. R. Warner & Co.

X Q. 59. I think you said you were in the employ solely of the Pfeiffer Chemical Company?

A. I drew my salary from the Pfeiffer Chemical Co. and understood that the Pfeiffer Chemical Co. engaged me as a representative.

X Q. 60. You had a written contract as salesman with them?

A. I did.

45 X Q. 61. And in it you agreed in writing to turn over to them all their property when you left their employ.

Mr. Bradford: Objected to as incompetent.

A. I don't remember what the contract called for, never did get an understanding of the contract.

X Q. 62. Didn't you have a copy of it?

A. I had a copy of it.

X Q. 63. Don't you remember perfectly well that you agreed therein that when you left their employ you would turn back to them all their property?

Mr. Bradford: Objected to as immaterial.

A. No, I don't, as I never got an understanding of the contract.

X Q. 64. This blue paper which you produce here was a paper which belonged to them, did it not?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 65. Did you turn back other property to them?

Mr. Bradford: Same objection.

A. I did. Property in substance.

X Q. 66. And retained this blue paper? Is that correct?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 67. And when you went into the employ of the competitor Lilly, you handed this blue paper to them. Is this correct?

Mr. Bradford: Same objection.

A. I handed the blue paper to Mr. Whidden as it was of no use to me, seeing that I was not representing them, the Pfeiffer Chemical Co.

Adjourned until 2 p. m.

Met pursuant to adjournment.

X Q. 68. Who is Mr. Whidden?

A. At that time representing Lilly & Company in San Francisco, California.

X Q. 69. You have testified to a conversation you had with Mr. Stevenson, as I understood it. Was this conversation or was anything put in writing?

A. Nothing put in writing. Just verbal instruction.

X Q. 70. Where were you when you talked with Mr. Stevenson?

A. In the Argonaut Hotel and also for two or three days while he was schooling me in my work.

X Q. 71. Where were you being schooled during those two or three days?

A. In San Francisco.

X Q. 72. In what building or house or otherwise or on the road?

A. From store to store.

X Q. 73. Was Quin-Coco the only preparation that you would handle and as to which he was instructing you?

A. Quin-Coco was the product I was given explicit instructions to sell against Coco-Quinine as Coco-Quinine had an enormous sale in California.

X Q. 74. Repeated.

A. To the best of my knowledge it was the only pharmaceutical product that emphasis was laid on.

X Q. 75. You still don't answer my question. I ask you now what other products you were starting out to sell and to which you were receiving instruction from Mr. Stevenson.

A. The other Pfeiffer products were Castoria to be sold against Fletcher's Castoria; Arnica Salve to be sold against Bucklins Arnica Salve, which was at that time competitive. Those are the only two preparations that I can recall to mind.

X Q. 76. Hadn't the Pfeiffer Company a long list containing a great many preparations which were being sold on that market?

A. They had. Yes.

X Q. 77. Well, can't you remember what you were to sell?

A. No, sir, I can't.

X Q. 78. Is that because your memory is deficient or is it because there were no others?

A. I don't remember them because I have had so much to learn in the Lilly line whose policy is so different that I proceeded to forget what I learned in the Pfeiffer line.

X Q. 79. I still ask you whether there may not have been a considerable number of other products which you were to sell subsequent to your talk with Stevenson?

A. There may have been but I don't recall them.

X Q. 80. Then your memory is deficient in that respect?

A. No, sir.

X Q. 81. Then why can't you recall them, if there may have been such.

A. Because in representing the Pfeiffer Chemical Co. if I remember rightly, there were 37,000 items listed and I made it a point of selecting from the list, items to specialize on and items that had the biggest market.

X Q. 82. What sort of a list did you have in your hand to show you what the items were that the Pfeiffer Company were selling, a book or so?

A. I had catalogues.

X Q. 83. And you were authorized to sell any of those items on your catalogue, were you not?

A. I was authorized to sell all the products that the Pfeiffer Company made.

X Q. 84. During your employment by that company how many of these different products did you sell?

Mr. Bradford: Objected to as immaterial.

48 A. I cannot recall.

X Q. 85. You have testified that Mr. Stevenson gave you specific instructions as to the sale of Quin-Coco. I now ask you to state those instructions in his own language.

Mr. Bradford: Objected to as calling for an impossibility.

A. That I cannot do because apart from the items to be sold and instructions on items, I had so many other things to learn as I was just starting on the road and everything was new to me.

X Q. 86. Had you never sold drug preparations before?

A. I had sold them in a retail drug store but I had never sold them on the road.

X Q. 87. Where was the drug store?

A. The B. & S. Drug Store, 21 Ellis St., San Francisco, California.

X Q. 88. Then it would seem that Mr. Stevenson's instructions crowded on you a good deal?

A. Not exactly crowded. I remembered the facts that he emphasized.

X Q. 89. Can you remember the facts he emphasized in regard to any other product than Quin-Coco?

A. Castoria.

X Q. 90. What did he emphasize on that?

Mr. Bradford: Objected to as immaterial.

A. Sell Castoria as a replacer of Fletcher's Castoria.

X Q. 91. What do you understand "replacer" means?

A. Replacer I understand as a substitute.

X Q. 92. What do you understand a substitute to mean in your trade?

A. The understanding of substitute while with the Pfeiffer Chemical Company was that we had a product that was so much
49 like the other fellow's that one could not tell the difference between the two.

X Q. 93. Do you mean that one could not tell the difference be-

tween the preparation itself with respect to the appearance, taste, etc., or one could not tell the difference between the packages in which the preparations were put up?

A. My understanding is that you could not tell the difference between the product, irrespective of the package.

X Q. 94. Can't you remember just what Stevenson said to you and give me his exact words?

A. No, sir, I can't.

X Q. 95. Can you see in your mind's eye where he was or in what building or room or place when he said to you, what you have testified to in chief?

A. No, sir.

X Q. 96. Then all you can do is to give us a sort of a general idea that that was the substance of what he said to you or taught you. Is that correct?

A. The instructions given to me by Mr. Stevenson were so emphatic that I am absolutely certain that Mr. Stevenson told me not only once, but several times, that Quin-Coco was the same as Coco-Quinine.

X Q. 97. And you can't give his words?

A. No, sir. I can't.

X Q. 98. And that was the subject of his teaching, was it?

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 99. Please state who Mr. Stevenson was. That is, what relation he held to the Pfeiffer Chemical Company, so far as your understanding went.

Mr. Rawle: Objected to because the question is not proper for re-direct-examination.

50 A. My understanding of the position that Mr. Stevenson held with the Pfeiffer Chemical Company was that while he wasn't exactly a Pacific Coast Manager, I saw a letter or telegram, I am not sure, which, from the Pfeiffer Chemical Co. suggesting or instructing him to engage the services of a representative for the territory that I had in California and my understanding from that was that he was an overseer, as it were, of the Pacific Coast representatives for the Pfeiffer Chemical Company.

Mr. Rawle: Objection to the question and answer because transactions with the Pfeiffer Chemical Co. do not bind the defendant also objects to the answer because it is purely hearsay and the witness cannot testify to a writing or telegram which he does not produce or explain his failure to do so.

R. D. Q. 100. Did you or did you not accept the instructions of Mr. Stevenson as given with the authority of the Pfeiffer Chemical

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Company and as the authorized representative and agent of that company?

Mr. Rawle: Objection to the question as not proper for re-direct-examination also because dealings with the Pfeiffer Chemical Co. does not bind the defendants. Also because what the witness did is not relevant to this issue.

A. I accepted Mr. Stevenson's authority.

R. D. Q. 101. I think in your direct examination you stated with reasonable clearness what Mr. Stevenson's instructions were, so far as the sale of Quin-Coco is concerned but Mr. Rawle has endeavored to have you state Mr. Stevenson's exact words. I will not ask you to state his exact words, but to state his instructions again as nearly as you can in the words that he used.

Mr. Rawle: Objection to the question because what occurred between the witness and Pfeiffer Co. does not bind the defend-
51 ants; also because his question is entirely improper for re-direct-examination, the witness having fully answered a similar question on direct-examination and having answered a like question on cross-examination and this attempt to have the witness vary his statements is entirely irregular.

Mr. Bradford: Counsel for complainant resents the imputation that there is any attempt to have witness vary his statements. There was a plain attempt by counsel for defendant to obtain such result and the above question is merely for the purpose of affording witness an opportunity to re-state the facts as he remembers them, without seeking to confine him to the exact words used by Mr. Stevenson.

Mr. Rawle: Mr. Rawle points out the impropriety of the statement just put on the record by the opposing counsel while the witness is on the witness stand.

A. I can't remember the words Mr. Stevenson used, but the nut of my instructions was to sell Quin-Coco for Coco-Quinine as he had been slipping it to Lilly on Coco-Quinine in the Sacramento Valley.

R. D. Q. 102. And this was coupled with such instructions as stated in your direct testimony concerning representations that you might make to the drug trade. Is this so?

Mr. Rawle: Mr. Rawle objects because the acts of Pfeiffer Company do not bind the defendants, because the witness has been fully examined and this question is not proper for re-direct-examination and because the question is absolutely leading.

A. It is.

R. D. Q. 103. In your cross-examination a number of questions were based upon "competing" products. Is or is it not true
52 that there are a large number of general pharmaceuticals manufactured and sold by all pharmaceutical manufacturers?

A. The catalogue of pharmaceutical houses is usually made up into two. General Line and Specialties. The general line part are

practically all competitive. The specialty part is a list of products that a house specializes on and is not generally competitive.

R. D. Q. 104. I think you stated that there were something like 37,000 items in the Pfeiffer Chemical Co. catalogue. Do you make this statement on your actual knowledge from counting the items or merely as a guess or as a statement from some other source?

A. I had the idea that, and I don't know where I got the idea from, that the Pfeiffer Chemical Company listed 37,000 items. That was the understanding I had.

Re-direct-examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 105. If there were various pharmaceutical concerns selling a class of competitive preparations, do you mean by that that more or less of them competed on any one class of products or that several of them sold similar products?

A. I mean that Part 1 of the Catalogue as referred to previously was competitive to the Part 1 of the Catalogue issued by competitive pharmaceutical houses generally.

R. X Q. 106. And when different drug concerns sold competing articles they could be substituted for each other, could they not?

A. That is not substitution in my understanding of substitution. If a physician specifies Fluid Extract of Cascara, Lilly, and a fluid extract of Cascara made by another house is put in to fill a prescription, that is substitution. But if he writes for Fluid Extract
53 of Cascara and does not specify that, the druggist has the privilege of using any make he wishes.

R. X Q. 107. And that is all a question of the honesty of the druggist, is it not?

A. To a large extent.

R. X Q. 108. And substitution is dishonest and the other practice is square?

A. Substitution is dishonest, yes, sir.

R. X Q. 109. It is a question of conscience of the druggist, isn't it?

A. Yes.

R. X Q. 110. And when you went out to sell goods after your talk with Mr. Stevenson, did you proceed to tempt the druggist to buy your products and substitute?

A. I was paid by the Pfeiffer Chemical Co. to sell goods and if I didn't wish to follow out instructions, how could I hope to draw my salary?

Re-cross-examination closed.

Deposition closed.

CHARLES L. HOOPER.

Mr. D. B. DUNHAM, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.
A. D. B. Dunham. 39. 530 Arbor Ave., Indianapolis, Indiana. Druggist.
Q. 2. Please state if you are familiar with the preparation known as Coco-Quinine and if so, by whom it is manufactured and what you know about it?
A. I am familiar with the preparation. It is manufactured by Eli Lilly & Co., Indianapolis, Indiana. It is a preparation of Quinine with the taste of Quinine disguised by the cocoa.
54 The first put on the market that I know of was this preparation Coco-Quinine manufactured by Eli Lilly & Co.
Q. 3. Do you know anything of other preparations of a like character and if so, what?
A. Well, yes. Wm. R. Warner & Co. has a similar preparation of a different name. They give it the name Quin-Coco.
Q. 4. What do you know about Quin-Coco?
A. Well, Quin-Coco, as far as I know, is a similar preparation to the Coco-Quinine. It contains the same amount of Quinine to the ounce as the Coco-Quinine.
Q. 5. Do you handle both preparations?
A. I handle both preparations.
Q. 6. From whom do you buy Quin-Coco?
A. Wm. R. Warner & Co. and Coco-Quinine from Eli Lilly & Co. shipped through the jobber.
Q. 7. What representations, if any, are made to you by Warner & Company or their salesmen, when soliciting your orders for Quin-Coco?
A. Well, it is represented to me to be the same preparation as the Coco-Quinine and no difference could be detected by the people and costs us less money than the Coco-Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Do you carry on a large and important drug store in Indianapolis, Indiana?
A. I am carrying on a drug store that makes me a living.
X Q. 9. Centrally located?
A. No, sir.
X Q. 10. And you say that you handle both the Quin-Coco and the Coco-Quinine. Is that correct?
A. Yes, sir.
55 X Q. 11. And sell them to your customers as different preparations?
A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 12. Where is your drug store located?
A. 1277 Oliver Avenue, Indanapolis, Indiana.
R. D. Q. 13. Do you sell these preparations on physician's prescriptions or over the counter or both ways?
A. Well, I don't remember ever having a prescription for the Quin-Coco but I have had prescriptions for the Coco-Quinine. The other preparation I sell to the trade as a syrup of quinine, when a syrup of quinine is called for or if they ask me for a preparation of that kind I give them that and label it Quin-Coco or Syrup of Quinine.
R. D. Q. 14. But as I understand your last answer, you sell it when Syrup of Quinine is called for and label it Syrup of Quinine?
A. If I recommend it to them I label it as it is named. Lots of people come into the store and call for preparations of that kind under different names. The reason why I label it the name they call for is to enable them to not become confused and think they got the wrong preparation.
R. D. Q. 15. When physicians' prescriptions specify Coco-Quinine, do you ever use the Quin-Coco?
A. No, sir.
R. D. Q. 16. I think you stated in speaking of this product that it is a preparation of Quinine with the Quinine disguised by Cocoa or some statement of that kind, I don't recall the exact language. Is this correct?
A. No, it is not disguised by Coco. It is disguised by Yerba Santa.
56 R. D. Q. 17. What is the Cocoa used for in the preparation, if you know?

Mr. Rawle: Objected to as the witness is not qualified to answer the question.

A. For flavoring.

Re-direct-examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 18. Do you know of any other preparations on the market of Chocolate Quinine?
A. No, I do not. Never handle any other.
R. X Q. 19. Do you know of any?
A. I do not.
R. X Q. 20. Have they ever been offered to you?
A. They have not.

Deposition closed.

D. B. DUNHAM.

Mr. Louis Pink, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation?
A. Louis Pink. Age, 39. Residence, 2715 North Illinois St. Place of business, 550 Indiana Ave. Retail Druggist.
Q. 2. Please state what you know, if anything, concerning a pharmaceutical product known as Coco-Quinine and also the product known as Quin-Coco.
A. All I know of Coco-Quinine is that it is made by Eli Lilly & Co. and I have been handling it ever since they have had it on the market. I don't know anything about the other product excepting having seen the same of the salesman. I have never handled any of it.

57 Q. 3. Have you been solicited to purchase Quin-Coco and if so, how?

Mr. Rawle: Objected to unless the witness first states who solicited him and shows a relation with the defendants.

A. Well, there were different salesmen representing the Pfeiffer people. I don't know their names but they have sold me other goods from the Pfeiffer Chemical Co. They solicited my business on that product but I never bought any. They said that I could use it in place of Coco-Quinine, that there was absolutely no difference and no one could tell the difference.

Mr. Rawle: Mr. Rawle objects to the answer because no transactions with the Pfeiffer Chemical Co. can affect the rights of the defendants.
Mr. Bradford: In respect to this objection and for the information of the Court it is made of record that Mr. G. A. Pfeiffer of the Pfeiffer Chemical Co. is present and has been since the beginning of the examination of witnesses in constant consultation with counsel for defendant.
Mr. Rawle: Mr. Rawle states that Mr. Pfeiffer is here as officer of the defendant company and in no other capacity.

Q. 4. How do you dispense Coco-Quinine in your store?
A. Why we dispense it on physician's prescriptions and also if it is called for by the laity.
Q. 5. Have you ever had a physician's prescription which called for Quin-Coco?
A. No, sir.
Q. 6. Have you ever had a customer call for Quin-Coco?
A. No, sir.

Mr. Rawle: No cross-examination.

Deposition closed.

LOUIS PINK.

Mr. A. D. THORBURN, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. A. D. Thorburn. 42. 316 East 33rd St., Indianapolis, Indiana. Pharmacist in the employ of Pitman Moore Co., Manufacturing Pharmacists, and Secretary of the Company and chemist in charge of the production of the goods.

Q. 2. How long have you been in your present place of employment and where were you employed previously?

A. I have been with Pitman-Moore Company since September, 1906, and for about five years previous to that time with the Searle & Hereth Co., of Chicago.

Q. 3. What do you know, if anything, of a product on the market under the Searle & Hereth label, called Quin-Coco?

A. Nothing.

Q. 4. Was such a product manufactured by the Searle & Hereth Co. while you were with them?

A. No, sir.

Q. 5. Are the Searle & Hereth Co. now in business, do you know?

A. Yes, I understand they are in business. I have no direct knowledge but I presume they are. I hear of Searle & Hereth goods being sold, so I suppose they are still in business.

Q. 6. It is stated that the Searle & Hereth Co. are controlled by the Pfeiffer Chemical Co. If this is true, do you know when the Pfeiffer Chemical Co. took over the Searle & Hereth business?

Mr. Rawle: Objected to as hypothetical and because the witness has not been shown to have any knowledge on this subject and it is not the best evidence.

A. Mr. G. A. Pfeiffer, so far as I know, took charge of the Searle & Hereth business in June, 1906. I don't know whether at that time he controlled the business through ownership or the exact date at which this transfer took place.

Q. 7. Do you know that at that time the Searle & Hereth Co. had not begun the manufacture of Quin-Coco?

A. While I was with the Searle & Hereth Co. for several years, a sample of each batch of goods made by the Searle & Hereth Company went through my hands and there was at no time a sample of Quin-Coco submitted in this way. Nothing was sold until it had first passed through the Inspection Department, of which I had charge. The formulas owned by the Searle & Hereth Company were in my hands also and we did not have a formula on hand for the manufacture of Quin-Coco, consequently up to June, 1906, I think it is extremely unlikely that the company made any of these goods, without my knowing about it and I am quite sure that this article was not made by the Searle & Hereth Company.

Q. 8. When did you leave the employment of the Searle & Hereth Company,

A. The first part of August, 1906.

Q. 9. Was anything done in the way of manufacturing Quin-Coco between June and August, 1906.

A. No, sir; not at the Chicago plant.

Q. 10. Have you any knowledge of the product known as Coco-Quinine and if so, what can you tell us relative to it.

A. I have bought and sold Coco-Quinine in retail drug stores and possibly have seen a sample of it some ten years ago, but have not seen any since.

Q. 11. Do you know by whom it is manufactured?

A. It is made by Eli Lilly & Co. of this City.

Q. 12. Is or is it not recognized in the trade as one of their specialties?

60 A. I have always understood that it was one of their specialties or one of their preparations to which they have given special attention and to be specially interested in the sale of it.

Q. 13. Did the Searle & Hereth Co. manufacture or contemplate manufacturing any product of the same character so far as you know while you were with them?

Mr. Rawle: Objected to as irrelevant.

A. During all the time I was with the Searle & Hereth Co. I was employed in experimental work on new preparations. Very often our salesmen or customers asked us to furnish articles which were being sold in the trade by other houses. My recollection is that we considered for a time making a chocolate quinine mixture and that Mr. Hereth gave instructions that we should not do so. I do not think that we made any definite experiments for the development of the formula but simply received the request and accumulated a few facts regarding the article and then asked for instructions from Mr. Hereth. Following his instructions we discontinued all work on this article.

Mr. Rawle: Answer is objected to as irrelevant and as largely hearsay.

Q. 14. What reasons, if any, did Mr. Hereth give for his instructions not to proceed with this matter?

Mr. Rawle: The question is objected to as irrelevant.

A. He told us that this was a preparation on which Eli Lilly & Co. had done special work and that he preferred not to compete with them on this article.

Q. 15. As a chemist, I would like to ask whether or not in your opinion it is possible to make a liquid quinine preparation without the use of the chocolate or cocoa, that would be successful from a therapeutical and commercial standpoint?

61 Mr. Rawle: Mr. Rawle objects to the question as entirely vague.

A. Yes, sir.

Q. 16. Please state whether or not, in your opinion the cocoa is essential to any therapeutical virtue of the product.

Mr. Rawle: Mr. Rawle objects to the question because it doesn't appear what the product is or what a therapeutical virtue is.

A. I do not regard it as essential to any therapeutic virtue of Coco-Quinine.

Q. 17. Would or would it not be possible to make other liquid Quinine preparations flavored with other syrups than Chocolate or Cocoa and if so, will you suggest some such syrups?

Mr. Rawle: Same objection.

A. Quinine syrups are often made with Yerba-Santa and such added flavors as Anise, Coriander or other sweet essential oils. Licorice in syrups is also used to disguise the taste of Quinine and this mixture can be flavored with essential oils, such as above named.

Q. 18. In the last named preparation what function does the licorice perform?

A. It disguises the taste of the Quinine and gives color to the preparation.

Q. 19. As I understand it, this would be used in with the Yerba-Santa or in the place of?

A. This usually is employed without the Yerba-Santa and is considered an effective cover for the taste of Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 20. You have testified to the possibility of making the Quinine mixture with Anise, Coriander or other oils or
62 Licorice. Have you ever known of such preparation to be made with Quinine and any of those oils that have been commercially successful or more or less largely sold on the market?

A. The Pitman-Moore Co., with whom I am now employed, sell a mixture containing Calisaya alkaloids, including Quinine made from simple syrup and flavored with Lemon and a similar preparation flavored with Peppermint in white and yellow colors, which meets every demand made on us by our customers for a tasteless Quinine preparation. We consider it one of our successful preparations.

X Q. 21. What about making commercially a similar preparation out of Anise, Coriander or Licorice? Has that been done commercially and successfully?

A. We have made such preparations and I have frequently dispensed them in retail drug stores.

X Q. 22. What you dispensed were made up at the time?

A. In some cases, yes. When I say "we" have made them I mean "I" have made them as a retail druggist.

X Q. 23. But no drug house has ever made such a Quinine preparation with Anise, Coriander, etc., to any commercial extent. Is that correct?

A. We have supplied customers with this same liquid Quinine preparation flavored with Anise.

X Q. 24. You mean in a few instances?

A. Yes, in a few instances. We have not thought it necessary to supply it regularly because we had already settled on the formula with lemon and peppermint referred to above and are supplying that as a stock article.

X Q. 25. Won't you reflect a moment and see if you cannot remember that Searle & Hereth did make and sell a syrup of Quinine that had either Chocolate or Cocoa in it?

A. I have no knowledge of such preparation while I was
63 in their employ and I feel very certain if they had made it, I would have known it.

X Q. 26. Mention some of the leading drug manufacturers in the country.

A. Parke-Davis; Sharpe & Dohme; John Wyeth & Co.; H. K. Mulford & Co.; W. R. Warner & Co.; Eli Lilly & Co. selling a general line of pharmaceuticals.

X Q. 27. Is it not a common practice among pharmaceutical houses to manufacture and place on the market preparations similar to those of other houses?

A. It is common practice to place preparations representing the same therapeutical agents contained in preparations sold by other houses.

X Q. 28. And is it not common where one preparation has met with certain success for other houses to place a similar preparation on the market?

A. It is not common for us to do that in the sense of duplicating the other articles and selling it as a substitute complete and entirely as the preparation that has met with success.

X Q. 29. What is meant in the trade by "selling as a substitute"?

A. My understanding is that means something that completely replaces the successful article or the article to be substituted.

X Q. 30. In other words, it comes directly into competition with the article that is already on the market? Is that correct?

A. I would say that it is something intended to entirely replace the article that is already on the market.

X Q. 31. Don't you mean an article intended to come in direct competition with another article?

A. It is possible to come in direct competition with it without furnishing a substitute in the sense in which the trade understand these words. We can furnish an article intended to replace the successful one from a medicinal standpoint without intend-
64 ing to duplicate the successful article in every particular, pharmaceutical or in regard to the physical characteristics of the preparation.

X Q. 32. If two preparations are pharmaceutically the same would the mere change in color of one by any important coloring matter take it out of the class of substitutes?

A. I think it would. Such a change would make it impossible

to deceive a purchaser into thinking he was getting one article for the other.

X Q. 33. Could you give a list of any considerable number of replacers?

Mr. Bradford: Objected to as immaterial.

A. I don't quite understand the word "replacers."

X Q. 34. What do you understand by the word "replacer?"

A. I would suppose you meant one preparation could be sold for another and would lead the purchaser to think that he was getting an article of one manufacturer when he was getting in reality the article of another.

X Q. 35. I understand that was what you meant by the word "substitute." Am I correct?

A. That would be practically the same meaning. I am not familiar with the exact shade of the word "replacer" in the trade.

X Q. 36. Are you familiar with the word substitute in the trade.

A. I have heard that used more frequently, yes.

X Q. 37. Is it not a fact that the drug houses for many years have in many instances put out preparations similar to existing and more or less successful preparations sold by other houses?

A. I think it is.

X Q. 38. Isn't it true that the practice has been quite general in the drug houses?

95 A. I don't know how general it is but I know that there have been efforts made to stop the practice by voluntary agreement between the houses.

X Q. 39. A gentlemen's agreement?

A. Well, I think some of the drug associations have adopted an understanding. I don't know just what form, by which the members of the association understood that they were not to duplicate other preparations.

X Q. 40. Then by substitute or replacer you would now use the word "duplicate," would you not?

A. No, sir.

X Q. 41. What meaning then, in this connection, has the word "duplicator"?

A. I think the word "duplicate" is used in this connection so as to have a somewhat indefinite meaning, so that an association would not be adopting too narrow a view of the subject.

X Q. 42. Have you in mind any particular association as having attempted to prevent duplication?

A. The American Association of Pharmaceutical Chemists has suggested this to its members. I think that outside of the associations the American Druggist, a trade journal, at one time suggested that preparations be registered through their office so that names and labels and characteristics would not be duplicated.

X Q. 43. Then there were two efforts in this direction, neither of which were naturally successful. Is that correct?

A. I am not able to say how successful these have been.

X Q. 44. Can you mention an effort on the part of any other body or combination of drug houses?

A. I don't recall any organized effort beyond what I name, though such may have occurred.

X Q. 45. From these efforts, if no more, may we not infer that there was a somewhat general practice in the drug houses of duplicating?

66 A. I think it has been more general than it is at present.

X Q. 46. Do you mean that perhaps the drug houses are keeping up their old duplications but are not going into so many new ones?

A. I think some of the old ones have been discontinued.

X Q. 47. And is the other statement in my question partly true?

A. I think so many new ones have not been made.

X Q. 48. And also some of the old ones have not been kept up?

A. I expect some of the old ones have.

X Q. 49. Now are you not ready to say that in earlier days it was distinctly common to duplicate?

A. As long as I have been connected with the drug trade there has been a protest against such duplication and I do not think that it has been as common to duplicate these preparations as it has been to make new ones.

X Q. 50. Question repeated.

A. No.

X Q. 51. How common was it? Was it done more or less?

A. It was done, but I am unable to say how common it was.

X Q. 52. Was it done to your knowledge to a considerable extent?

A. Considering the number of preparations that had been introduced into medical use, I do not think that the drug trade generally has made a practice or did at any time make a practice of duplicating a large number of these preparations in such a way that the new article could be sold for the old and the purchaser deceived.

X Q. 53. In referring to deceiving the purchaser, are you speaking of the physical and pharmaceutical qualities of the drug only or do you also include the package in which the preparation might be put up?

67 A. It would include the package, the physical properties, and the origin or maker.

X Q. 54. That being your answer, I now ask you to disregard the package and the appearance of the preparation when offered for sale and to say whether it was not at least a common practice on the part of drug houses to duplicate the preparations of other houses? Disregard also protection by trade-mark or other governmental protection.

A. Not to my knowledge. No.

X Q. 55. Please say what was not to your knowledge.

A. It was not common practice to duplicate the successful article so as to deceive the purchaser in regard to the origin of the article.

X Q. 56. Are you not in this answer bringing in the question of

the way in which the package or the preparation was put up and offered to the trade?

A. No, sir.

X Q. 57. If two preparations of the same color are put up in entirely different packages, you would call that duplication or replacer?

A. Without more knowledge of the case, I could not say.

X Q. 58. Haven't you, in your last two or three questions been thinking of articles which both in themselves and in the package were similar to each other?

A. I have been thinking of articles rather not similar to each other as the question required me to.

X Q. 59. If one Trade Journal and one National Association of the drug trade took up the question of duplication, what was the evil they sought to remedy?

A. I think in the case of the Trade Journal it was an attempt primarily to establish priority of rights and in the case of the Association it was this same factor entered into their consideration and also there was a desire to keep one house from infringing on the rights of another.

X Q. 60. Do you mean to keep one house from duplicating the products of another?

A. No. I mean if one house could establish a right to a preparation, that the Association sought a simple way of notifying the trade that this house had or claimed to have those rights and that the members of the Association would then make no effort to make a substitute for this article.

X Q. 61. I asked you a few questions ago to state what was the mischief to be remedied which led the drug trade and the journal to take up this question?

A. I presume the people who thought they had rights to the manufacture and sale of these preparations felt that the rights were being injured by someone and that the effort through the journal and the association was an attempt to protect themselves.

X Q. 62. Do you mean that their rights were being injured by some other drug house?

A. That is my opinion.

X Q. 63. And in that opinion you are not referring to what we would call legal infringement of legal rights of members of the drug trade, are you?

A. I don't think the question of rights was limited only to the legal rights, that is rights by copyright or patent or trade-mark.

X Q. 64. And it was not limited to any kind of infringement which might grow out of similarity of packages, was it?

A. No. I don't think so.

X Q. 65. Then it went beyond that on a moral plane, did it not?

A. I think it did.

X Q. 66. And it went beyond legal rights on a moral plane, did it not?

A. I think it did.

X Q. 67. As a result of these two movements on the part of the

Association and the Trade Journal, was the mischief fully remedied?

69 Mr. Bradford: Counsel for complainant has refrained from objecting to this long line of irrelevant examination, expecting to discover some pertinent purpose, but now interposes an objection to the questions based upon any action of any drug journal or any trade association as having no possible bearing upon the issue.

A. I am unable to say from personal knowledge what the general condition of the drug trade is in this respect.

X Q. 68. When your house gets out a new preparation, does it register it with that Trade Journal or with that association?

A. It never has registered anything with the trade journal and we notify other members of our association by means of price list when we make additions to our list of preparations.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 69. Has it ever been, within your experience, considered good morals or good business ethics for one drug manufacturing concern to place upon the market a preparation which can be used as a "replacer" or substitute for a successful specialty of another concern?

Mr. Rawle: Mr. Rawle objects to the question because the witness' opinion on the moral question is not required for the enlightenment of the Court and because the question is so framed that it brings not only the physical preparation but includes the package.

A. No, I have never regarded it as good practice.

R. D. Q. 70. Does the house with which you are connected, the Pitman-Moore Co., make a practice of manufacturing sub-
70 stitutes for the successful specialties of other houses?

A. No, sir.

R. D. Q. 71. Why does it not?

Mr. Rawle: Objected to as irrelevant.

A. We have found that business secured in this way does not help the reputation of the house. It is not directly profitable and does not win us the support of our customers. There is a decided sentiment among our customers against this practice.

R. D. Q. 72. So far as you know, was there any other motive behind the movement on the part of the Drug Association to which you referred, than to promote the ethics of the business and establish business practices in the trade upon a higher plane?

A. No, sir.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 73. You have just asked if your house makes a practice of making substitutes for the specialties of other houses. What do you understand to be the meaning of "substitute" in that question?

A. An article that can be sold to a purchaser and he be made to understand that he is getting the same as the successful article already on the market.

R. X Q. 74. That includes both a similarity of the physical preparation and probably also the dress in which it is also put up and sold.

A. It would depend upon the circumstances of the sale at the time. Now, if it is sold to a druggist or a physician in an original package then, of course, in order to deceive this purchaser, why, everything connected with it would have to be an imitation. If it is sold taken from this original package and sold to another party, then the question of the original container itself would not enter into consideration.

R. X Q. 75. Then by "making substitutes" in the question put to you by Mr. Bradford, you include such similarity of package as would tend to deceive the buyer, do you not?

A. That is included in the question, yes.

R. X Q. 76. Now, he asked if you made a practice of "making substitutes" and I understood you to say that your house did not. I now ask you whether you ever have made a preparation similar to that of another drug house but put up in a distinctive package?

Mr. Bradford: Objected to as immaterial.

A. Yes.

R. X Q. 77. Can you mention one or more instances in which your house has done so?

A. Before I came with the Pitman-Moore Co. a Quinine preparation like Coco-Quinine was made. It was not offered in a package that imitated the Eli Lilly & Co. package.

R. X Q. 78. How was that preparation made and what was it called?

A. It was called Quin-Coco, and was made from Yerba-Santa and Chocolate or Cocoa and sugar and flavoring material and Quinine Sulphate.

R. X Q. 79. Can you mention any other preparations of your house similar to those of other houses physically and pharmaceutically, but not similar in package, in addition to the Quin-Coco which you have just specified as one such?

A. We make a Hydrastis and Sodium Bicarbonate mixture that I think represented the same medicinal agents as a preparation made by another house but I am unable to say that it is exactly similar to that made by the other house.

R. X Q. 80. Was it intended to be similar in medicinal effect?

72 A. It is intended to be similar in medicinal effect.

R. X Q. 81. Can you mention any others?

Mr. Bradford: Objected to as entirely immaterial.

A. We make a liquid Cascara preparation.

R. X Q. 82. To whose preparation is that similar?

A. To any aromatic Cascara. We were not the originators of this preparation.

R. X Q. 83. Who was?

A. I think it is claimed that Parke Davis & Co. or Frederick Sterns & Co. originated this.

R. X Q. 84. Any other?

Mr. Bradford: Same objection.

A. We make a long line of preparations that are similar in medicinal action to the same drugs as represented in preparations made by other houses.

R. X Q. 85. Are there dozens of such or how many, roughly?

A. Our firm has introduced very few new chemical compounds or crude drugs to the medical profession and necessarily the preparations which we sell, represent articles previously known so far as their medical action is concerned.

R. X Q. 86. And preparations previously known?

A. No, sir.

R. X Q. 87. Do not other drug manufacturers follow the same practice as you have said you followed?

A. I expect they do.

R. X Q. 88. Do you know of Guaiatonic?

A. I do.

R. X Q. 89. Do you make any similar product?

A. We make a product representing Guaiacol and Creosote but it is a different color and different materials are used in flavoring it and it is made by a somewhat different process than Guaiatonic.

Recross-examination closed.

73 Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 90. Is it or is it not true that there is a long line of general pharmaceuticals manufactured in common by nearly all of the drug manufacturing concerns?

A. It is true there is a long line of pharmaceuticals such as fluid extracts, tinctures and other preparations representing the same drugs manufactured by pharmaceutical concerns.

R. R. D. Q. 91. Is the fact that such common pharmaceuticals are manufactured by different concerns in your judgment any justification for one concern manufacturing an imitation or a substitute for a successful specialty of another concern?

Mr. Rawle: Mr. Rawle objects to the question as irrelevant and because the opinion of the witness on a moral question is not required for the enlightenment of the Court, it being a question purely for the Court.

A. No.

R. R. D. Q. 92. Mr. Rawle has in his questions referred not only to physical characteristics but also to patents, trade-marks, etc. So far as you know, is the product Coco-Quinine dispensed by the druggists in original packages?

A. Why, I have no knowledge of this feature of the matter.

R. R. D. Q 93. Suppose the fact to be that the product is dispensed on physicians' prescriptions in broken packages and without the original label, would the color and the flavor of the product, in your judgment, be of value in identifying the origin of it?

A. It would.

74 Re-recross-examination.

By Mr. Rawle:

R. R. X Q. 94. Then it is all a question of the honesty of the druggist, is it not?

A. Why, the purchaser ought to be considered in the matter. I don't quite connect the question with the subject-matter.

R. R. X Q. 95. If a druggist in compounding a prescription wilfully uses therein the wrong drug or preparation, isn't that solely a question of the honesty of the druggist?

A. That determines whether the druggist is honest or not.

Re-re-cross-examination closed.

Deposition closed.

A. D. THORBURN.

Recess till 10 a. m. tomorrow.

Met pursuant to adjournment.

Mr. JESSE E. WILSON, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Jesse E. Wilson; 42; 148 North Pennsylvania St., Indianapolis, Indiana; Pharmacist, Manager Francis Pharmacy.

Q. 2. In your business have you had any experience with a product known as Coco-Quinine? If so, what can you tell us about it?

A. Well, it is a preparation manufactured by Eli Lilly & Co. for a good many years. I can't say how many. It is universally considered as a standard preparation of Quinine with the taste 75 disguised. A pleasant preparation of Quinine. It is the only preparation of its kind we sell.

Q. 3. How is it dispensed in your store?

A. It is dispensed on prescriptions and the public has a large

knowledge of it and quantities of it are sold over the counter and it is asked for under that name.

Q. 4. It is asked for under what name?

A. Coco-Quinine.

Q. 5. Comparatively speaking, what is the extent of your prescription business?

A. Compounding prescriptions constitutes the larger part of our business. I presume that we do the largest prescription business in the State.

Q. 6. Have you ever had a prescription calling for Quin-Coco?

Mr. Rawle: Objected to as irrelevant.

A. Not to my knowledge.

Q. 7. Have you ever had a call for Quin-Coco in your store?

Mr. Rawle: Same objection.

A. Not to my knowledge.

Q. 8. What is the policy of your store as to handling what are known in the trade as substitute preparations?

Mr. Rawle: Objected to as irrelevant and immaterial.

A. We never use substitutes of any kind.

Direct-examination closed.

Mr. Rawle: No cross-examination.

Deposition closed.

JESSE E. WILSON.

76 Mr. J. K. LILLY, being called as a witness on behalf of complainant, being first duly sworn, in answer to interrogatories by Mr. Bradford, testifies as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Josiah K. Lilly; President of the corporation of The Eli Lilly and Company; age, 53; 1420 North Meridian Street, Indianapolis, Indiana.

Q. 2 As President of the complainant corporation you are familiar with the issue involved and I would ask you to please state in a narrative way the history of the beginning of the manufacture and sale of a product known as Coco-Quinine?

A. For a number of years previous to the introduction of Coco-Quinine we felt an urgent demand for a palatable liquid preparation of Quinine. This demand was largely created by a proprietary preparation then on the market that was palatable and that had a large demand. It consisted in a mixture of Cinchona Alkaloids suspended in a syrupy medium. To fill this field we designed and placed on the market the preparation known as Coco-Quinine. The basis of this preparation was a syrup of Yerba-Santa used at that time to some extent by pharmacists to disguise the bitter taste of Quinine by mixing the Quinine with the syrup at the time of dis-

pensing. This syrup of Yerba-Santa, known under various names by different manufacturers, called Yerbazin by the Lilly corporation, yielded a satisfactory preparation, but being common property and all manufacturers having a perfect right to manufacture it, we saw the necessity of giving our new preparation a characteristic color and flavor so that it would be different from anything that had been previously used. We found a satisfactory color and flavor in chocolate and after considerable experimentation and having overcome many difficulties, the preparation was perfected and placed upon the market under the name of Coco-Quinine. This name also to give it character. The experimentation was done largely in the year of 1899 and the preparation was marketed generally in 1900. Depending on the characteristic color and flavor and the distinctive name, we expended considerable sums upon promoting its sales till it became one of our most important specialties.

Q. 3. Please explain, if you can, how this preparation was received by the trade and the extent of its sales and the growth thereof from year to year in response to your efforts to promote its sale?

A. The result of our first year's sales were about $14,000. This was 1900. The sales grew year by year until they amounted to nearly $100,000 annually. For several years past, however, the sales have not increased and occasionally would be a little less than the previous year.

Q. —. About what period did the growth of the sales appear to reach the climax?

A. About 1913. The sales were virtually the same for the years 1910, 1911, 1912 and 1913.

Q. 5. Have the efforts of Eli Lilly & Co. to promote the sales of this specialty been relaxed during the period of the apparent standstill in the sales?

A. No, the usual efforts were made annually to promote its sales.

Q. 6. Please explain if you can the reasons for the growth of the sales stopping at about the period named?

Mr. Rawle: Objected to as for a matter of opinion instead of a matter of fact.

A. We have good cause to believe that it was due wholly to the competition of preparations made to duplicate Coco-Quinine in color and in flavor and offered to the drug trade at a lower price.

Q. 7. On what do you base this belief?

Mr. Rawle: Same objection.

A. Reports from our 145 traveling representatives who reported seeing on the shelves of the trade the preparations aforesaid and the frequent information coming to them that other preparations were being substituted upon prescriptions calling for Coco-Quinine.

Mr. Rawle: The answer is objected to as hearsay and especially as it refers to "substituted upon prescriptions calling for Coco-Quinine," which must be, so to speak, hearsay.

Q. 8. I show you a bottle of preparation and ask you what it is.
A. It is a preparation known as Coco-Quinine made by Eli Lilly & Co. in the original package of one pint.

The bottle in question is offered in evidence and marked "Complainant's Exhibit Bottle No. 4, being a bottle of complainant's product known as Coco-Quinine.

Q. 9. I now show you another bottle and ask you what this purports to be?
A. This is an original pint package (which we have opened for the purpose of sampling) of a preparation marketed under the title of Quin-Coco under the name of the Searle & Hereth Co., Manufacturing Chemists, St. Louis, Mo.

The bottle in question is offered in evidence and marked "Complainant's Exhibit Bottle No. 5," the same being a bottle of defendant's product called Quin-Coco.

Q. 10. Please state what you know of this preparation and what bearing it has upon the sales of Coco-Quinine?
A. This preparation known as Quin-Coco has, to our certain knowledge, been offered generally throughout the United States and having the same appearance and flavors may easily be mistaken for our preparation of Coco-Quinine and being sold to the drug-
79 gist at a somewhat lower price it has been largely placed with the trade and has, without doubt, secured a large volume of sales, the volume of which is unknown to us.

Mr. Rawle: The answer is objected to as hearsay and opinion evidence and not based upon any ascertained or stated facts and as inadmissible and guesswork.

Q. 11. Please state as to the comparative appearance and flavor and therapeutical value of these respective products?
A. Almost identical.
Q. 12. Would you, if given a quantity of the Quin-Coco by a druggist, in response to a physician's prescription for Coco-Quinine, be able to detect, either by ordinary observation or taste, the difference between the product called Quin-Coco and Coco-Quinine?
A. Comparison by experts might detect a slight difference. Ordinary examination would not detect a difference.
Q. 13. Please state as to the practice of the manufacturers of pharmaceuticals in placing upon the market preparations of similar character? In other words, what is regarded as the ethics of the business among reputable concerns?

Mr. Rawle: Objected to because the question calls for an answer from the witness on a matter of law and the opinion of the witness on so broad a basis as the one contained in the question would obviously not enlighten the Court.

A. Many manufacturers in the United States scrupulously avoid duplicating, in a manner that might deceive, the preparations of

other manufacturers, especially those designated as specialties. This practice is generally considered among manufacturers as good morals and proper ethics and is considered perfectly legal as long as it does not tend to create a monopoly or restrain trade. Other manufacturers make it a practice to duplicate as nearly as possible the preparations of others in such manner as to deceive, rendering it possible to substitute the one preparation for the other.

Q. 14. Are there, or are there not, many pharmaceutical products of a general character manufactured in common by all manufacturers of pharmaceuticals?

A. Yes, many thousands of them, those that are official in the United States Pharmacopœia and many others that are called for by the medical pharmaceutical professions and are common property to all.

Q. 15. Please explain the difference, from an ethical standpoint, between the practice of different concerns in manufacturing pharmaceuticals of this character which are substantially duplicates of each other and the practice of manufacturing what you have termed as specialties, which are duplicates of each other.

Mr. Rawle: Objected to as calling for a statement of what is a matter of law on the facts.

A. What is known as general pharmaceuticals being common property all manufacturers feel perfectly free to make and market them without any restrictions whatsoever. When one manufacturer, however, creates something new and original and expending time and money in creating, introducing and establishing same, many other manufacturers do not feel that they have any legal or moral right to duplicate the preparation precisely in color and flavor or general nature and undertake to secure trade that has been created by the originator. They, therefore, refrain from such practices. This does not interfere in the least with their creating something entirely different yet competing in the same field of usefulness.

Q. 16. Have, or have not, the complaints coming into your office from your representatives throughout the country concerning the substitution of Quin-Coco for Coco-Quinine been general or from special localities?

Mr. Rawle: Objected to as calling for hearsay; such complaints of admissible evidence should be produced by the witness; objection is further made to the word "substitute" or "substitution" as the witness has not shown that there is any such thing in fact.

A. The reports have come from nearly all portions of the United States but naturally very largely from those sections known as malarial sections, where quinine is used more frequently.

Mr. Rawle: The answer is further objected to as not in any way specifically connecting the evidence with the defendants.

Q. 17. Please explain the purpose of the chocolate or cocoa in the preparation of Coco-Quinine.

A. It was selected as a color and a flavor for this preparation because there was not on the market a liquid preparation of Quinine that contained Cocoa, so it was selected to make it different from any other like preparation and to designate it as the Lilly product. Its presence is not essential to its palatability or Quinine-disguising power.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

Not waiving objections to the examination-in-chief.

X Q. 18. You have referred to the malarial districts or sections of the country. Is it not true that in the last five or ten years malaria as a disease has very substantially lesse-d in this country and especially the Southern States, such as Texas, Louisiana, Mississippi, Arkansas, due probably to better drainage and to the elimination, more or less, of mosquitoes as malaria carriers?

82 A. There is no doubt that malaria is decreasing in such districts, yet there still remains a very large use of Quinine in those districts.

X Q. 19. Are you prepared to say that your sales in malarial sections have not fallen off?

A. They have fallen off in Coco-Quinine but not in other Quinine preparations, such as capsules, pills, tablets, etc.

X Q. 20. Are you now speaking of malarial sections only?

A. No, I am speaking of the United States generally, but more particularly in those districts known as malarial districts.

X Q. 21. What do you understand to be malarial districts?

A. Those districts of the country contiguous to the lower Mississippi, the tidewater countries of Connecticut, New Jersey, Virginia and Florida, and such sections where stagnant water and mosquitoes abound as distinguished from the higher, better drained sections.

X Q. 22. Hasn't there been a general war declared on mosquitoes and haven't they become to be considered as malaria carriers?

A. There has been a great deal of agitation of the subject but as far as I can observe, very little actual results have been obtained.

X Q. 23. Isn't Quinine a specific for malaria or chills and fever?

A. It is a specific for the destruction of the malaria plasmodium.

X Q. 24. And that it is such a specific is very deeply rooted in the minds of the American people, is it not?

A. It is.

X Q. 25. Are you prepared to say, in view of these facts that the amount of malarial fever in the low-lying districts that you have mentioned, has not been diminished in late years?

A. I am not informed.

83 X Q. 26. I was under the impression that in answer to an earlier question you said that the amount of malarial fever had been reduced.

A. You are wrong in that, sir.

The witness having had the first question in cross-examination read to him, now states:

A. We are informed that the amount of malaria is decreasing in such districts, but to just what extent I am not informed.

X Q. 27. You have testified as to lessening sales of your Coco-Quinine and referred to other houses duplicating it. Will you name the houses that have done so to your knowledge?

A. The Wm. R. Warner Co. under the label of Searle & Hereth most largely. Smaller quantities have been noted on the market being made by the John T. Milliken Co. of St. Louis; Meyer Bros., Drug Co., of St. Louis; the Henry S. Wampole Co., of Baltimore, and the H. K. Mulford Co. of Philadelphia.

X Q. 28. May there be others?

A. That is hearsay, Mr. Rawle.

X Q. 29. Please state any information that you have on the subject of others.

A. The First Texas Chemical Company of Dallas, Texas, and the William S. Merrell Co. of Cincinnati have been reported to us as making and selling such a preparation.

X Q. 30. Are the preparations that these various concerns make and sell similar products to yours in respect to being a compound of chocolate and quinine?

A. Yes.

X Q. 31. Are they being offered or are some of them being offered for sale all over the country or to a large extent throughout the country?

A. I am not fully informed.

X Q. 32. Have you come into competition with them or all of them in the sale of this preparation, more or less?

A. To a small extent.

X Q. 33. You have testified as to a large number of preparations that are set forth in the United States Pharmacopœia and have become, as you said, common property. Is that correct?

A. Yes.

X Q. 34. Is it not true that certain specialties have from time to time become so acceptable that they have become standard and then have passed substantially into the United States Pharmacopœia or the National Formulary?

A. Certain preparations that were first introduced as specialties have been incorporated into the National Formulary so far as to formula as near as the compilers of the National Formulary were informed as to the true formulas. But in no case where such formulas were incorporated in the National Formulary was any attempt made to duplicate the specialty in color, odor, flavor or characteristics that would give it individuality.

X Q. 35. You say, "no attempt was made." By whom do you mean no attempt was made?

A. By the compilers of the Formulary.

X Q. 36. What is the National Formulary?

A. The National Formulary is a publication issued under the auspices of the American Pharmaceutical Association in which is

incorporated certain drugs and compounds not incorporated in th
United States Pharmacopœia. This publication being included wit
the Pharmacopœia under the Food and Drugs Act of June 30, 190
is now an authoritative standard.

X Q. 37. Hasn't your company recently, or within the last fe
years increased its facilities for the manufacturing of empty an
filled capsules?

Mr. Bradford: Objected to as immaterial.

A. Yes.

85 X Q 38. And haven't you also during the period mentione
put special stress on the manufacture and sale of Quinin
filled capsules?

A. No.

X Q. 39. Is it a considerable part of your business?

A. No.

X Q. 40. Have the sales in the Quinine-filled capsules increase
during the past five years?

A. Yes.

X Q. 41. Extensively?

A. Not extensively.

X Q. 42. To a considerable extent?

A. Not to a great extent but has increased in proportion to th
general increase of the business.

X Q. 43. Is it not possible that this increase in the Quinine-fille
capsules may have affected the sale of your Coco-Quinine product?

A. I think not.

X Q. 44. Why not? Are they not both Quinine preparations,
specific for malarial fever?

A. Yes, they are both of the same nature and for the same pu
pose but we put special effort in advertising and sales power on Coc
Quinine but, owing to the small profit enjoyed from the sale
Quinine capsules, we make no effort whatever to promote their sal
Furthermore, it has been demonstrated that capsules are contra-in
dicated in certain low form of fevers where the process of digestion
all but suspended and in such cases a liquid preparation, such
Coco-Quinine is more beneficial. By contra-indicated I mean th
the indication is against their use owing to the danger of the capsu
passing through the body undissolved, the patient thereby failing
secure the benefit of the action of the Quinine.

X Q. 45. You have testified that there are many thousands
preparations manufactured by all pharmaceutical manufacturers an
you specified among them those that are set forth in the Unite
States Pharmacopœia. Assume that two or more pha
86 maceutical manufacturerers place any one of these prepar
tions on the market and there is a case of substitution, is n
that a mere question of the honesty of the druggist who makes th
substitution?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. If the preparation when prescribed or called for is indicated

he that of some particular manufacturer and the druggist substitutes the preparation of another manufacturer, that is, of course, simply a question of the honesty of the druggist, providing he does this without the permission of the prescriber.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 46. Referring to the sale of Quinine in capsule form, is not this method considered free to all and common in the business of all manufacturers of pharmaceuticals?

A. Yes.

R. D. Q. 47. In addition to the reason given in your cross-examination for the administration of Quinine in liquid form, are there any other reasons than those stated that you can think of or any other instances where the liquid preparation would be preferred to a Quinine preparation in capsule form?

A. Many patients have difficulty in swallowing a capsule. Especially is this frequent with women and children. Here the liquid preparation is preferable. The presence of the gelatine might be considered objectionable in certain cases as before noted.

R. D. Q. 48. Mr. Rawle has asked your opinion as to the practice of druggists in the substitution of a U. S. P. preparation of one manufacturer for a similar preparation of another manufacturer called for by the prescription. I would like your opinion on this question. Suppose a druggist is induced by the representative of a manufacturing concern to purchase a medicinal preparation on the representation that it is the same as a well known and popular specialty of another house and can be dispensed when the preparation of the other house is called for by its trade name and that the physician and the customer will never know the difference and that the druggist can obtain this preparation for a lower price than the price of the preparation of the original manufacturer, thereby making a larger profit and the druggist yielding to the temptation thus offered, buys the substitute preparation and uses it in the manner as explained to him by the representative in question, then does this practice become solely a question of the honesty of the druggist?

Mr. Rawle: Objected to as irrelevant and hypothetical.

A. My opinion is that such practice on the part of both the druggist and the representative is reprehensible in the extreme.

R. D. Q. 49. Will you please state whether or not you have any practical experience as a chemist and whether your answers calling for chemical knowledge have been based on such experience?

A. I have studied chemistry and practiced chemistry, am a graduate of the Philadelphia College of Pharmacy. Have been engaged in the manufacture of chemicals and pharmaceuticals for 39 years.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 50. I hold in my hand Complainant's Exhibit Bottle No. 4, being a pint bottle of liquid Quinine produced by you. I see on it a representation of a factory with the word "Lilly" in red
88 letters. What significance has that mark in your business?

Mr. Bradford: Objected to as immaterial and not cross-examination.

A. The cut of the factory has no significance but the word "Lilly" in red script is a fac-simile of the signature of the founder of the house and is a registered trade-mark appearing on all labels affixed to the goods emanating from our laboratories.

R. X Q. 51. In substantially the form as it appears on this bottle?

A. Yes.

R. X Q. 52. Could you state when that was registered as a Trade-mark?

A. My memory does not serve me but a copy of the registration will be furnished you.

R. X Q. 53. Have you ever in your advertisements referred picturesquely to this red Lilly as indicating the Lilly product. Perhaps in the words, "If you see the red Lilly there, it is our product" or any similar words.

A. I would not flatter ourselves that we are able to do anything picturesquely but we have a slogan in use to effect—"If it bears a red Lilly, it's right."

R. X Q. 54. Do you print and have you always printed that slogan on your advertising literature, more or less?

A. No, that doesn't appear on all of our literature and on none of our labels but just occasionally, as an advertising proposition.

R. X Q. 55. Has it ever appeared on your letter heads?

A. My memory does not serve me in this respect.

R. X Q. 56. Can you say whether this red "Lilly" has invariably been on the label of your Coco-Quinine product?

A. Possibly not, in the first few years, but it has been in the main and is now universal.

89 R. X Q. 57. And has been for the last five years?

A. Yes.

R. X Q. 58. For the last ten years?

A. Possibly, but no longer.

R. X Q. 59. Do your numerous salesmen make use of this slogan or are they instructed to do so, or understood to do so?

A. No, it is only issued in printed form.

R. X Q. 60. Is its existence in a slogan in the words you have mentioned well known to your salesmen and has been?

A. Yes.

R. X Q. 61. It is rather current around your business, isn't it?

A. Yes.

R. X Q. 62. Sort of E Pluribus Unum?
A. Sic Semper Tyrannis.

Re-cross-examination closed.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 63. Is the trade-mark "Lilly" the only trade-mark by which the various products of your concern are known?

Mr. Rawle: Objected to as immaterial.

A. The only trade-mark for the general line, but we have certain trade-marks for individual preparations.

R. R. D. Q. 64. Is the general trade-mark referred to or the special trade-marks for the several products the only means by which those products become identified with the house and their origin recognized in the trade?

A. No, the name of the corporation The Eli Lilly and Company appears with these Trade-marks on all packages.

R. R. D. Q. 65. Reference has been made to advertising. What field is covered by your advertising and in what way?

90 A. Our advertising goes to physicians, pharmacists, dentists and veterinarians in the form of circulars, pamphlets, letters and also in the technical journals going to such professions, such as The Pharmaceutical Era, American Druggist, Practical Druggist, Journal of the American Medical Association, and a number of other medical journals.

R. R. D. Q. 66. Are your products advertised to the laity?

A. No.

R. R. D. Q. 67. Is Coco-Quinine sold to the laity generally in original packages or in bottles provided by the druggist?

A. Rarely in original packages, almost universally re-bottled into smaller containers by the druggist. Our direct sales are made only to wholesale druggists who in turn supply them to the retail druggist. Our salesmen call upon physicians and retail druggists. All orders from physicians are turned to the retail druggist for execution and all orders from the retailer are turned to the jobber for execution, we making no direct sales to either druggist or physician.

Re-redirect examination closed.

Deposition closed.

JOSIAH K. LILLY.

It is stipulated and agreed by and between counsel for the respective parties that the Exhibits introduced or to be introduced may remain in the custody of the party in whose behalf they are introduced, until the day of the hearing, subject to examination by opposing counsel and use of opposing counsel, whenever needed in the taking of evidence or preparation of the case.

Adjourned to meet at the Hotel Ponchartrain, Detroit, Michigan, at 9.30 a. m. to-morrow.

91 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

STATE OF INDIANA,
County of Marion, ss:

I, A. C. Rice, a Notary Public in and for the County of Marion, and State of Indiana, do hereby certify: That, pursuant to notice and agreement of Counsel, I was attended at the office of Bradford Q Doolittle, 1451-1455 Lemcke Annex, in the City of Indianapolis, and State of Indiana, by E. W. Bradford, Esq., on behalf of complainant and Francis Rawle Esq., Counsel for defendant, on the days and dates hereinbefore stated; that the aforenamed witnesses, E. G. Eberhardt; R. A. Whidden; C. L. Hooper; D. B. Dunham; Louis Pink; A. D. Thorburn; Jesse E. Wilson; and J. K. Lilly; who were of sound mind and lawful age, were by me duly sworn to testify the truth, the whole truth, and nothing but the truth, in the above entitled cause and that they thereupon testified as is above shown; that the depositions by the witnesses subscribed as above set forth were reduced to writing by myself and under my direction in the presence of the witnesses themselves and from their state-

92 ments, and were read over by the said witnesses and subscribed by them, and that all was so done at the place above specified and at the times set forth, and that said depositions were written and signed in the presence of myself and Counsel for complainant.

I further certify that each of the above witnesses resides at a place more than one hundred miles from the place of the trial of this cause.

I further certify that the exhibits as cited, were offered in evidence and marked as specifically noted in the foregoing depositions of E. G. Eberhardt, Ray A. Whidden, and J. K. Lilly and that, pursuant to a stipulation by Counsel for the respective parties, I have delivered said exhibits to Counsel for complainant to be retained and produced in accordance with the stipulation in that behalf contained.

I further certify that I am neither Attorney nor Counsel for any of the parties in said deposition or caption made, and am in no wise interested in the result of said cause.

Witness my hand and official seal at Indianapolis, in the State of Indiana, this 23rd day of March, 1915.

[SEAL.]

A. C. RICE,
Notary Public, Marion County, Indiana.

My commission expires April 9, 1916.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

Detroit, Michigan, March 24th, 1915.

Depositions of Witnesses Taken on Behalf of the Plaintiff Before Charles E. Riordon, Special Examiner, Commencing Wednesday, March 24th, 1915, at Detroit, Michigan.

Met pursuant to adjournment from yesterday, at Indianapolis, Indiana, and pursuant to notice and agreement of Counsel, at the Ponchartrain Hotel, Detroit, Michigan.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

ROCKWELL ROMAN, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Rockwell Roman; age, 32; Detroit, Michigan; foreman of the Order Floor of the Michigan Drug Company.
Q. 2. What are your duties in this position?
A. To oversee all the orders that go out.
Q. 3. Do you see all the orders that come in as well?
A. Yes.
Q. 4. Does your house handle the product known as Coco-Quinine?
A. We do.
Q. 5. What do you know in regard to this product?
A. I know that we have handled Coco-Quinine for a number of

years and have never known of any similar preparation in our stock.

Q. 6. Have you ever had orders for a similar preparation under other names?

A. I don't recall any such orders.

Q. 7. Is this product recognized in the trade as the product of any particular manufacturer and if so, who?

A. It is recognized as the product of the Eli Lilly Company.

Q. 8. Is the demand a continuous and general one in your territory?

A. Yes, it is quite extensive, almost every day we have orders for it.

Q. 9. What is the extent of the territory served by the Michigan Drug Company?

A. We cover the better part of Michigan with the exception of the extreme West, and the northern part of Ohio and Indiana.

Q. 10. Your house does a strictly jobbing business?

A. Yes, strictly jobbing.

Q. 11. How does the business of your house compare with other jobbing houses, if you know?

95 A. Well, we think we are one of the largest in the country.

Q. 12. Has the demand for Coco-Quinine at your house been an increasing or a diminishing one in recent years?

A. Increasing without a doubt.

Q. 13. In case you receive an order for liquid chocolate quinine preparation or quinine preparation containing chocolate or cocoa, what preparation would you think was intended by the party giving the order?

A. I would think that Coco-Quinine would fill the bill. We never have in stock anything else.

Direct examination closed.

No Cross-examination.

ROCKWELL ROMAN.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILLIAM H. MARTIN, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William H. Martin; age, 44; 620 Pa. Ave., Detroit, Michigan; representative of the Eli Lilly & Company, for Eastern Michigan.

Q. 2. What are your duties as representative of the Eli Lilly & Company?

A. Selling Eli Lilly's complete line of pharmaceuticals, including detail work of physicians such as leaving samples and [illegible]

8 ture. I also call on the retail trade and jobbers, take orders and turn the orders over to the jobbers. We fill no orders ourselves.

Q. 3. Among other products which you handle or the sale of which you promote do you include Coco-Quinine?

A. Yes, sir.

Q. 4. Tell us in your own way what you can relative to the trade in Coco-Quinine in your territory and any interference with that trade which you have experienced?

A. Well, for a number of years I have sold Coco-Quinine to the trade and for the last two or three years I have frequently noticed some of the buyers, that is retail druggists handling a preparation called Quin-Coco, which was sold to them for a preparation said to be similar to Lilly's Coco-Quinine. I have frequently asked druggists that were handling Quin-Coco if they received prescriptions for same. They have told me that they did not and that all prescriptions for Coco-Quinine or like preparations specified by prescriptions read Coco-Quinine. I have been to my knowledge in one store behind the prescription case when a person handed in a slip of paper calling for Coco-Quinine and the prescription clerk came behind the prescription counter in the presence of another party and filled the Coco-Quinine order with Quin-Coco. At the same time I called his attention to it.

To my knowledge Coco-Quinine is the only advertised product to the physicians by the way of literature and samples. I have never seen a syrup of chocolate quinine or sweet quinine or Quin-Coco, with my experience of some six or seven years with the Eli Lilly & Co., left in a physician's office or any literature pertaining to any preparation claimed to be similar to Lilly's Coco-Quinine.

My retail druggists that I have asked why they buy Quin-Coco have answered in this way that it cost them less money than Coco-Quinine.

9 By Mr. Rawle: I object to so much of the answer as is palpable hearsay and object specially to the statement of the witness as having been behind the prescription desk of a druggist, &c., for the reason that no act of such druggist is relevant here or can affect any right of the defendant.

I also ask the Special Examiner duly appointed by the court to instruct the witness in future answers to confine his testimony to facts known to him as facts and not to make any statements of what other people have told him.

By Mr. Bradford: Counsel for plaintiff objects to any instructions going to control the witness in his answers for the reason that in this kind of examination opposing Counsel is privileged to place his objections upon record against any testimony not within the accepted rules of evidence and the court alone is the only tribunal competent to pass upon the competency or incompetency of such testimony.

Further that the enforcement of such instructions outside of the court is dangerous inasmuch as it might prevent placing upon the

record facts that are material to the interests of one or the other parties to the suit.

(The Special Examiner in response to Mr. Rawle's request states that he does not consider it within the province of the Special Examiner to instruct the witness but under the rules and decisions is required to take everything said by the witness.)

Q. 5. Did you report the facts which you have referred to in your last answer to your house, I mean to Eli Lilly & Co.?

By Mr. Rawle: Objected to as irrelevant.

A. I did.

98 Q. 6. And were these facts the basis of your report?

(Same objection.)

A. They were.

Q. 7. As I understood your answer in the one instance referred to you saw the prescription for Coco-Quinine which was filled by the druggist with a product called Quin-Coco?

(Objected to unless the writing is produced for cross-examination, and for the reason given above that the act of the druggist does not bind the defendant.)

A. I said that I saw a piece or slip of paper that was handed to the prescription clerk in the presence of a witness, Mr. Otto Kessel, calling for Coco-Quinine and will state further as the prescription clerk passed by the witness and myself he said I have an order for Coco-Quinine but as I have none I will use Quin-Coco. I saw him take a bottle and fill it from a Quin-Coco bottle, label same and hand back to customer.

By Mr. Rawle: The answer is objected to so far as the same is hearsay.

Cross-examination:

Mr. Rawle, without waiving objections heretofore made, cross-examines as follows:

X Q. 8. Did you consider that honest on the part of that druggist?

A. No, sir.

X Q. 9. Give me his name and address?

A. W. H. Friars, Saginaw, Michigan. That is the store. The clerk's name I do not know.

X Q. 10. When was this incident?

A. Inside of the last four months. He gave me an order for a gallon of Coco-Quinine while I was there.

By Mr. Rawle: Notice is hereby given that at the proper time motion will be made to strike from the record he hearsay

99 testimony given by the witness and the other parts of his testimony to which objection has been made.

WILLIAM H. MARTIN.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

NOTE.—After the conclusion of the deposition the witness informs counsel that he has ascertained the name of the clerk referred to in answer to X Q. 9, to be a Mr. Day, and by request of counsel this note is added to make said name of record.

JOHN M. FRANCIS, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John M. Francis; age, 47; Detroit, Michigan; Chemical Superintendent of Park, Davis & Co.

Q. 2. Please state what experience you have had that will qualify you to testify as an expert in a case involving the giving of an opinion on chemical questions?

A. Twenty-three years service as pharmaceutical chemist with Parke, Davis & Co., during which time being intimately associated with and the examination of pharmaceutical materials, the use of pharmaceutical manufacturing processes and the production of pharmaceutical preparations.

Q. 3. Have you any familiarity with the product on the 100 market called Coco-Quinine, the same being a liquid preparation containing quinine?

A. Yes, sir, to the extent of having read the literature published in connection with such a preparation; and in having examined several commercial samples of such a product purchased from time to time and also from having made chemical analysis of the same and from having produced in an experimental way a similar preparation.

Q. 4. Will you please state your opinion as to any use or purpose of the chocolate or cocoa contained in this preparation?

A. My opinion as to the utility of chocolate or cocoa in such a preparation would be that it serves the purpose of imparting to such a preparation a distinctive flavor and a distinctive color. The use of such substance does not, in my opinion, impart to the mixture any characteristic medicinal action, nor does it modify the medicinal activity of the other ingredients involved.

Q. 5. Might or might not other syrups or other colors and other flavors be used in the product without changing its medicinal properties or characteristics?

A. Yes, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 6. In using a syrup in a quinine preparation of the general kind under consideration, what part does the syrup play?

A. If the syrup is not medicated it serves as vehicle and may serve according to its construction to give to the preparation a characteristic flavor and color.

X Q. 7. Does the chocolate or cocoa in such a preparation perform any function in holding the quinine in suspense, or in affecting the quinine in any way after the preparation is made, by solution or otherwise?

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A. In my opinion it does not.

X Q. 8. After such a preparation is made does any change take place in the quinine, physically?

A. I do not know.

X Q. 9. Is the quinine dissolved?

A. My belief based upon similar syrups made under my own supervision is that the quinine is in solution.

X Q. 10. Before or after the ingredients are mixed?

A. The quinine in the case of my own experiments was in solution at the time of mixing the ingredients. I would not argue from this, however, that such a preparation could not be made using quinine not in solution at the time the ingredients are combined.

X Q. 11. If not in solution at the time of mixing would solution of the quinine follow the combining of the ingredients?

By Mr. Bradford: Objected to as immaterial.

A. I cannot answer the question definitely; it would depend largely upon what other ingredients might be present in the prepar-tion.

X Q. 12. Are you not familiar with the ingredients in Coco-Quinine, Lilly?

A. Only insofar as this information is published by the above firm and insofar as my examination of the preparation concerned in an attempt to produce a similar preparation. I am basing my answers on quinine sulphate.

X Q. 13. Basing your answers upon such knowledge of Coco-Quinine, Lilly, please say whether, if the quinine sulphate is not in solution at the time of combining the ingredients as you understand them, solution of the quinine sulphate would follow such combining?

By Mr. Bradford: Objected to as immaterial.

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A. I believe that the greater portion of the quinine sulphate would exist in the preparation in solution.

JOHN M. FRANCIS.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

CLIFTON H. BRIGGS, a witness, called by and on behalf of the plaintiff, having been duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Clifton H. Briggs; age, 37; Detroit, Michigan; Chemist with Parke, Davis & Company.

Q. 2. Please state what experience you have had that will qualify you to testify as an expert in a case involving the giving of an opinion on chemical questions?

A. I am a graduate of the University of Michigan, with the degree of Master of Sciences, specializing in chemistry. I have been employed by Parke, Davis & Co., for nearly fifteen years as a research chemist and chemist in charge of the analytical and experimental chemical department.

Q. 3. Have you any familiarity with the product on the market called Coco-Quinine the same being a liquid preparation containing quinine?

A. Yes, sir. Coco-Quinine is a liquid preparation containing quinine Yerba-Santa and cocoa.

Q. 4. Please state your opinion as to the use or purpose of the cocoa or chocolate in this preparation?

A. It is used as a flavor and in my estimation does not lend
163 any particular properties as to covering up of the taste of the quinine, and it also gives a color to the product.

Q. 5. In your opinion could or could not other syrups of other colors and other flavors be used in this product instead of the chocolate and for the same purpose?

A. They could.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 6. What experience have you had which enables you to form an opinion as to the use or purpose of the cocoa or chocolate in Coco-Quinine?

A. I am familiar with some work which was done to attempt to produce a product of a similar nature to Coco-Quinine.

X Q. 7. What do you understand to be the ingredients of Coco-Quinine, Lilly?

A. Quinine in some form, Yerba-Santa, cocoa and syrup, with perhaps some other ingredients.

X Q. 8. When quinine sulphate is combined in this preparation does it afterwards come into solution? Assume that it had not previously been in solution.

By Mr. Bradford: Objected to as immaterial.

A. To the best of my knowledge the quinine does not exist in this preparation in soluble form.

X Q. 9. Do you mean that after the preparation has been made and placed in the bottle it will not come into solution?

(Same objection.)

A. So long as it is not removed from the bottle.

Cross-examination closed.

CLIFTON H. BRIGGS.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

104 WILLIAM M. MERITHEW, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William M. Merithew; age, 36; Highland Park, Michigan; Pharmacist, having a Pharmacy located in Highland Park, Mich.

Q. 2. Do you handle the product known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose product do you recognize this to be?

A. The product of Eli Lilly & Company, of Indianapolis.

Q. 4. How is this product dispensed in your store?

A. Both on prescription and counter calls. It is mostly dispensed in two, four, six and eight ounce bottles; very seldom in original packages. I mean in our own prescription bottles, under our own labels.

Q. 5. Do you know anything of a product called Quin-Coco, and if so, what?

A. Mr. H. L. Starring, representing the William R. Warner Company, offered to sell me a preparation known as Quin-Coco, stating that it could be dispensed as Coco-Quinine, when Coco-Quinine was called for. He exhibited a sample from his sample case, and stated to me that in both taste, physiological action and appearance it could not be distinguished from the original Coco-Quinine.

Q. 6. What other inducements, if any, did Mr. Starring offer as reasons why you should purchase the product he thus offered to you?

A. He stated to me that this product would be a good deal more economical in price than the original Coco-Quinine preparation.

105 That several druggists were using it in preference to the original Coco-Quinine, in several cities in Michigan, some of which he named as Saginaw, Bay City, and Flint.

Q. 7. Did you accept Mr. Starring's proposition and purchase Quin-Coco, and if not, why not?

A. I did not accept it for the reason that I have always tried to be ethical and dispense only those preparations which are specified either on original doctor's prescription blanks or given me orally by a customer.

Q 8. Did you ever receive a doctor's prescription calling for Quin-Coco?

A. No, I have not.

Q. 10. Did you ever receive a call over the counter for Quin-Coco?

A. No, I have not.

Q. 11. How long have you been handling this product? I mean Coco-Quinine.

A. To the best of my knowledge I have handled and dispensed Coco-Quinine ever since it has been on the market. I cannot give the exact date as to when I first dispensed it, but to the best of my knowledge the length of time is fifteen years.

Q. 12. Where is your drug store located in relation to Detroit?

A. Highland Park, Michigan, a suburb of Detroit.

Q. 13. Did Mr. Starring call upon you in reference to matter more than once and if so how many times?

A. To the best of my knowledge he spoke to me about it three distinct times.

Q. 14. Making the same representations each time?

A. Yes, sir, making the same representations.

Q. 15. How do you know that Mr. Starring is the representative of William R. Warner & Co.?

A. From his name appearing in the space on William R. Warner's bill heads, provided for their representatives.

Q. 16. Do you buy other goods from William R. Warner & Co., through Mr. Starring?

A. Yes, sir.

Direct examination closed.

106 Cross-examination.

By Mr. Rawle:

X Q. 17. When this salesman made these representations to you which you say were not ethical did you give him to understand that you resented them as an imputation on your honesty?

By Mr. Bradford: Objected to as immaterial and incompetent.

A. Not on my honesty but that I knew Eli Lilly's Coco-Quinine was the original product of cocoa and quinine and having had experience with a similar preparation manufactured by Parke, Davis & Co., of Detroit, I knew that it should not be palmed off on the unsuspecting public. Furthermore, I did not believe in substitution.

X Q. 18. And you thought substitution was not honest, did you?

A. Substitution is not honest.

X Q. 19. Then, he was asking you, according to your testimony to do something that was not honest, was he not?

A. He was.

X Q. 20. Now I ask you again whether when he asked you to do something that was not honest you gave him to understand that you resented that as an imputation on your honesty?

(Objected to as immaterial.)

A. I did not become angered at him or accuse him of wrongdoing, I politely informed him that I had never substituted, neither did I care to start to do the same.

X Q. 21. Then you did not show him that you resented his suggestion to you to do a dishonest thing?

A. I just simply told him that, as I have stated before, I did not care to dispense a substitute for the original article asked for.

X Q. 22. Give the exact words which you used?

107 By Mr. Bradford: Counsel for plaintiff has no objection to having all material facts upon the record, but it is apparent that the witness has answered counsel fully and frankly even to this immaterial thing and he objects to further questioning along this line as totally immaterial, irrelevant and incompetent.

A. I cannot recall the exact words.

X Q. 23. Can you recall the exact words which he used or any of them?

A. I cannot. I only can give a synopsis.

X Q. 24. How long ago was this?

A. The first time he spoke to me about this preparation was, as near as I can remember, a year and six months ago. I can give the date by reference, if the counsel so wishes.

X Q. 25. Is that substantially a correct statement of the length of time?

A. As near as I can remember.

X Q. 26. What was the date of the second time?

A. As near as I can remember it was three months thereafter.

X Q. 27. And the third time?

A. As nearly as I can remember it was six months after the second time.

X Q. 28. Then you talked with him three times within a year and a half or thereabouts and you cannot state now the exact language which he used or any part of it?

By Mr. Bradford: Counsel for plaintiff calls the court's attention to the fact that the witness has stated the substance of the conversations that took place and stated that he has given the language as near as he can recall it. Objection is made to further repetition of questions for no apparent purpose.

A. As I answered before to a previous question I cannot remember the exact language, only giving a synopsis of the same.

108 X Q. 29. Wasn't what he said that Quin-Coco was a similar preparation to Coco-Quinine and lower in price?

A. I cannot state his exact words, but he inferred to me that Quin-Coco was lower in price than Coco-Quinine, and therefore several of

the druggists were dispensing it in the cities of Michigan which I heretofore named.

X Q. 30. And that is the substance of what he said to you?

A. No, it is not. He spoke about the similarity of the preparation both in quality of quinine contained in each ounce, the physiological action and appearance. Now I am through.

X Q. 31. Have you finished your answer to that question?

A. I have.

X Q. 32. How long did the first interview last?

A. I cannot state the length of time he consumed in his conversation with me.

X Q. 33. How long did the second conversation last?

By Mr. Bradford: This question and the previous one objected to as immaterial.

A. As I am not in the habit of timing representatives of the various pharmaceutical houses who call on me, I cannot say.

X Q. 34. How long did the third interview last?

(Same objection.)

A. I cannot state for the reason before given.

X Q. 35. Did you buy any other preparations from him at either of these interviews?

A. I did.

X Q. 36. At all of them?

A. I did the first time he spoke to me about it and the second time. But as to the third I cannot just recall, but by looking at my books I can state more fully, in regards to the last time.

Cross-examination closed.

109 Redirect examination.

By Mr. Bradford:

R. D. Q. 37. In answer to one of Mr. Rawle's questions concerning the substance of Mr. Starring's representations to you, you said: "He spoke about the similarity of the preparation both in quantity of quinine contained in each ounce, physiological action and appearance."

In this answer what do you mean by "similarity," similarity to what?

A. To the preparation known as Coco-Quinine.

WM. M. MERITHEW.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

ERNEST G. SWIFT, a witness, called by and on behalf of the plain-

tiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Ernest G. Swift; age, 54; Detroit, Michigan; Secretary and General Manager of Parke, Davis & Co.

Q. 2. In what business is Parke, Davis & Co., engaged?

A. Manufacturers of pharmaceutical and biological products.

Q. 3. Do you know of Eli Lilly & Co., the plaintiff herein?

A. I do. They are a competing house in the same line of business as ours.

110 Q. 4. Do you know of a pharmaceutical preparation on the market known as Coco-Quinine, and, if so, state what you can in reference to it, and as to its origin, etc.?

A. It is a product manufactured by Eli Lilly & Co., and we have always recognized it as their own product and have not made or offered a competing article.

Q. 5. Do you know whether or not it would be possible to make a product which would compete in the same field so far as medicinal action is concerned, without duplicating the appearance and flavor of said product?

By Mr. Rawle: Objected to because the question is too general and too vague and because it does not appear that the witness is a chemist or trained in pharmaceutical matters, and the combination of material therein.

A. It is quite possible to make such a product, so far as competing in medicinal value is concerned, but that to duplicate the flavor by Parke, Davis & Co., would infringe on the Lilly priority rights.

By Mr. Rawle: The last part of the answer is objected to as irresponsive and volunteered.

Q. 6. Have you ever seen samples of liquid quinine preparations colored differently and flavored differently from Coco-Quinine?

A. I have seen several samples submitted by our experimental departments in response to the request of representativs for a similar article flavored entirely different but of a chocolate color.

Q. 7. Please state why Parke, Davis & Co., have not placed a preparation on the market similar to Coco-Quinine, if you know?

By Mr. Rawle: Objected to because the witness is not Parke, Davis & Co., and because the question is irrelevant to the issue and the answer could not bind the defendant.

111 A. Because they have respected what they believed to be the priority rights of Eli Lilly & Co., in the manufacture of said product.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. How many separate drugs and preparations does your concern make and sell at any given time?

By Mr. Bradford: Objected to as immaterial.

A. We have probably eight thousand or more items listed.

Cross-examination closed.

ERNEST G. SWIFT.

Subscribed and sworn to before me this 24th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at the Bancroft Hotel, Saginaw, Michigan, at 5 p. m., to-day.

Saginaw, Michigan,
Bancroft Hotel, March 24th, 1915—5 p. m.

Met pursuant to adjournment and notice.

Parties present as before.

ALBERT F. KNOWLES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

112 A. Albert F. Knowles; age, 41; Saginaw, Michigan; Druggist, and my Pharmacy is located in Saginaw, Michigan.

Q. 2. Please state if you handle in your store a product known as Coco-Quinine?

A. I do.

Q. 3. Whose product is this recognized to be in the trade?

A. Eli Lilly & Co.

Q. 4. How long have you been selling Coco-Quinine?

A. For thirteen years.

Q. 5. How do you dispense it?

A. On prescriptions and on calls, over the counter, in my own containers, with my own labels.

Q. 6. Do you ever receive prescriptions calling for a product under the name of Quin-Coco?

A. I have not.

Q. 7. Do you ever receive calls from customers for a product called Quin-Coco?

A. No.

Q. 8. Have you ever heard of a product called Quin-Coco, and, if so, what can you tell us with reference thereto?

A. A representative of the William R. Warner & Co. introduced the product and represented to me that I was foolish for paying the $4.80 for a gallon of Coco-Quinine when I could use his product at a cheaper price.

Q. 9. Use his product for what purpose?

A. For dispensing purposes, and also to sell on call.

Q. 10. On call for what?

By Mr. Rawle: The question and the preceding questions are objected to as not in proper form, the witness having referred to a conversation can only be asked — to what was said to him at that conversation. The question is therefore leading.

By Mr. Bradford: I will restate the question.

113 Q. 11. Please state what if anything the representative of William R. Warner & Co., said to you in reference to the dispensing of this product called Quin-Coco on call? I mean on call for what?

By Mr. Rawle: The question is objected to as irrelevant and leading and for the reason just stated.

A. For Coco-Quinine or chocolate quinine, syrup quinine or where the syrup of quinine is used.

Q. 12. Under what name is such a product as you have referred to usually called for in prescriptions and by customers at your store?

A. The prescription, Coco-Quinine. Over the counter on call, "Coco-Quinine," "chocolate quinine" and some even go as far as "syrup of quinine, brown color," depending upon the education of the customer.

Q. 13. What product do you understand a customer intends to order when he asks for chocolate quinine or any of these other names you have mentioned?

A. That is rather a hard question to answer. In my store I have educated my customers to use and I have always dispensed Coco-Quinine on such orders, as I have no other product with which to fill their calls.

Q. 14. Did you ever know of a chocolate quinine preparation prior to your knowledge of the Lilly product?

A. No.

Q. 15. What is the name of the representative of William R. Warner and Co., who made these representations to you in reference to Quin-Coco?

A. His name I have forgotten.

Q. 16. Was he their present Michigan representative?

A. No, that is, he was not the one that called on me last.

Direct examination closed.

114 Cross-examination.

By Mr. Rawle:

X Q. 17. When was this that this salesman called on you?
A. When he mentioned about the quinine it was in the Fall of 1914.
X Q. 18. You understood that he was not their regular man in this territory at that time?
A. I had no understanding to that effect at all.
X Q 19. Had you been visited by any other William R. Warner and Co. salesman in 1914?
A. Not that I can recollect.
X Q. 20. Have you ever bought drug preparations from William R. Warner & Co.?
A. I have.
X Q. 21. Through what salesmen?
A. The names I cannot remember excepting Mr. Berkeley. He called on me for quite a number of years, a couple of years before, I think.
X Q. 22. Has the William R. Warner & Co. salesman that you first referred to solicited your trade since the time you referred to?
A. Yes.
X Q. 23. How often?
A. I cannot recollect that.
X Q. 24. Briefly, what did he look like.
A. Medium height, rugged looking, red face, thick lips, dark hair, smooth shaven.
X Q. 35. Has he been at your place of business this year?
A. Not that I know of.
X Q. 26. Was that the last time you have seen him there?
A. No, he called once since.
X Q. 27. How long did this conversation last?
A. Probably ten minutes.
X Q. 28. Won't you state the salesman's exact words with reference to selling his product on call, &c.

By Br. Bradford: Objected to as immaterial.

115 A. He took a sample of Quin-Coco from his grip and asked me if I handled that product. I said "No, I have always used Coco-Quinine for all such calls." He said "Well, don't you think you could handle this to your advantage." I said "I did not like to do any substitution and I never practiced it and for that reason I would not order the product at all, that I preferred to used the Coco-Quinine." Then he stated the price that I was paying for the Coco-Quinine and that I could use his product and save the difference. I told him "no, I will continue with the Coco-Quinine as it always gave the best satisfaction."
X Q. 29. And that was all on that subject?
A. That was all on that subject.

Cross-examination closed.

A. F. KNOWLES.

Subscribed and sworn to before me this 24th day of March, 1913.

CHARLES E. RIORDON,
Special Examiner.

NOTE.—After the conclusion of Mr. Knowles' deposition he was asked by Mr. Rawle if on his return to his store he would not ascertain the name of the Warner representative and furnish it to the Examiner by telephone. He promised that he would and pursuant to such promise telephones the name of such representative to be a Mr. Rogers.

BERTRAM A. WRIGHT, a witness, called by and on behalf of the plaintiff, being first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

116 A. Bertram A. Wright; age 39; Saginaw, Michigan. Pharmacist. My Pharmacy is located in Saginaw, Mich.

Q. 2. Do you handle a product known as Cuso-Quinine in your store?

A. Yes, sir.

Q. 3. How long have you handled such a product?

A. Approximately six years.

Q. 4. Whose product do you recognize this to be?

A. Eli Lilly & Company.

Q. 5. How is it dispensed by you?

A. Principally on prescriptions but we do sell some over the counter when called for, in our own bottles?

Q. 6. Do you know anything of a product called Quin-Cure? If so, what?

A. Yes, sir, it is a preparation similar to Cuso-Quinine.

Q. 7. Have you ever had prescriptions written for Quin-Cure?

A. No, sir.

Q. 8. Have you ever had calls by customers for Quin-Cure?

A. No, sir.

Q. 9. Have you ever been solicited to purchase Quin-Cure, and if so, by whom?

A. I have by representatives of William R. Warner and Company.

Q. 10. What reasons were given by the representatives of William R. Warner and Company why you should buy Quin-Cure?

A. Well, that it was a preparation of quinine the same as Cuso-Quinine and it was cheaper and we would make more money out of it. That is as near as I can get at it.

Q. 11. Is this what they said to you?

A. I don't think they worded it the same as that, no, sir.

117 Q. 12. State as nearly as you can from memory the words in which Warner and Company's representatives made their statements?

By Mr. Rawle: Objected to as the witness has already testified to what they said "As near as he could get at it."

A. They told me I might just as well have Quin-Coco, and that it was the same as Coco-Quinine and cost me less money.

Q. 15. If you have no calls for Quin-Coco, how did they expect you to sell it?

A. Sell it as sweet quinine or Coco-Quinine.

By Mr. Rawle: Question and answer is objected to as the witness has already stated fully what was said at the interview.

Q. 16. Did or did not Warner and Company's representative tell you that when Coco-Quinine was called for you could supply the same with Quin-Coco?

By Mr. Rawle: Same objection and because the question is grossly leading.

A. Not directly. I told him that I would not supply it on any occasion but when people came in and called for Coco-Quinine I could possibly sell them Quin-Coco.

Q. 17. Did you buy Quin-Coco under these inducements as offered by Warner and Company's representative?

A. I did and also that they should create a demand for it.

Q. 18. Have you sold Quin-Coco when Coco-Quinine has been called for in your drug store?

By Mr. Rawle: Objected to because the act of this witness cannot bind the defendant.

A. Yes, but not on prescriptions.

Q. 17. In doing so were you or were you not following the instructions of the representative of Warner & Company?

18 By Mr. Rawle: Objected to as grossly leading and improper and because the witness has not testified that he had "any instructions."

A. Warner and Company's representative told me I could sell it the same as Coco-Quinine, there was no distinction.

Direct examination closed.

No cross-examination.

BERTRAM A. WRIGHT.

Subscribed and sworn to before me this 24th day of March, 1892.

CHARLES E. KNOWLES,
Special Examiner.

Geo. H. Lucas, a witness called by and on behalf of the plaintiff, being first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Otto Kessel; age 38; Saginaw, Mich.; traveling salesman for the Michigan Drug Company.

Q. 2. Do you know Mr. William H. Martin?

A. Yes, sir.

Q. 3. Were you ever with Mr. Martin in a drug store when any person handed over the counter a slip of paper calling for Coco-Quinine, and in response to which the prescription clerk of the store supplied Quin-Coco?

By Mr. Rawle: Objected to as leading.

A. Yes, sir.

Q. 4. Will you relate the circumstances?

119 Mr. Rawle: Objected to as immaterial and irrelevant because the testimony could not affect the rights of the defendants.

A. If I remember aright this was in the evening and I did not pay much attention to this thing when it happened, but the clerk said that was the only Coco-Quinine he had in the house and he gave him that. Later on I believe that the proprietor came and gave him an order for five pints or a gallon, I have forgotten now. It must have been some time ago.

By Mr. Rawle: The answer is objected to as hearsay.

Q. 5. Do you know the name of this store where this occurred?

A. Yes; W. H. Friar's drug store, of Saginaw, Mich.

Q. 6. Have you any personal knowledge of any other instances of the substitution of Quin-Coco for Coco-Quinine?

By Mr. Rawle: Objected to as not tending to connect the transaction, if any, with the defendants.

A. That is a question that I would have to answer by an experience I had the other evening. A customer asked me what Coco-Quinine was worth. I gave him the price, in pound lots and in gallons. He said " you are too high. I buy Warner's Coco for less money." "Well," I said, "you are not buying the Coco-Quinine, Lilly's." You can't buy this goods for the same money. That was all that was said. A little later on he called me up at the drug store and gave me an addition to his order and included a gallon of Coco-Quinine, Lilly's.

By Mr. Rawle: The answer is objected to as irrelevant and as res inter alia acta and as not binding on the defendant.

Direct examination closed.

120 Mr. Rawle, not waiving his objections, cross-examines as follows:

XQ. 7. You said that you did not pay much attention at that time
the drug store. Did you read the prescription yourself?
A. No, sir. I don't believe it was a prescription. I think it was
note that some child brought in there.
XQ. 8. Did you read the note?
A. No, sir.
XQ. 9. How long ago was this?
A. I don't know, it must have been two or three months ago
ow, probably longer than that. It may be three or four months,
somewhere around there.
XQ. 10. At the time were you standing behind the prescription
unter?
A. I believe we were about the edge of the prescription counter.

Cross-examination closed.

OTTO H. KESSEL.

Subscribed and sworn to before me this 24th day of March, 1914.

CHARLES E. RIORDON,
Special Examiner.

Adjourned until tomorrow, Thursday, March 25th, 1915, at 9 a. m., at the La Salle Hotel, Chicago, Illinois.

Chicago, Illinois,

La Salle Hotel, March 25th, 1915—9 a. m.

Met pursuant to adjournment and notice.
Parties present as before.

RAOUL R. HAAS, M. D., a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Raoul R. Haas; age 35; Chicago, Ill.; physician and surgeon.
Q. 2. Do you know anything concerning preparations for disguising the taste of quinine when administered in liquid form and if so, what?
A. There is one preparation I know of. It is called "Quinimel," and I wrote recently to William R. Warner, pharmaceutical chemist, located at Philadelphia, Pa., and they sent me the following letter with reference to the same. Here is the letter. (The witness here produces the letter.)
Q. 3. What was the substance of your inquiry in response to which you received this letter?

By Mr. Rawle: Objected to as the letter itself is the best evidence, unless its loss is explained.

By Mr. Bradford: The letter having been mailed to the defendant is undoubtedly in its possession and counsel for defendant can produce the same if he cares to. It is manifestly impossible for plaintiff to produce it.

A. On the 8th of March, 1915, I sent a letter worded about as follows:

"William R. Warner & Co.,
Philadelphia, Pa.:

I understand that you have a preparation on the market to disguise the taste of quinine, called 'Quinimel.' If such is the case I would appreciate literature and samples as regards the same.

Hoping to hear from you I beg to remain,

Yours respectfully,

R. R. HAAS, M. D."

122 Q. 4. The letter you have handed in was received in response to this inquiry, was it?

A. Yes, sir.

By Mr. Bradford: The letter in question and the envelope in which it is enclosed are offered in evidence and marked respectively "Complainant's Exhibit, Letter Warner to Haas" and "Complainant's Exhibit, Envelope, Warner to Haas."

Direct-examination closed.

No cross-examination.

RAOUL R. HAAS, M. D.

Subscribed and sworn to before me this 25th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

ROBERT A. HEVENOR, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert A. Hevenor; age 41; Hyde Park Hotel, Chicago, Ill.; sales manager for Fuller-Morrison Company, wholesale druggists.

Q. 2. Comparatively speaking, how extensive is the business of the house you represent?

A. We are the largest house in the Middle West, employing forty-two salesmen, covering Michigan, Wisconsin, Illinois, Iowa, Southern Minnesota and South Dakota.

Q. 3. Does your house handle a product known as Coco-Quinine?

123 A. Yes.

Q. 4. What do you know concerning the product?

A. I have been familiar with the product ever since Eli Lilly & Co. introduced it about fifteen years ago, and it was the first liquid preparation of quinine and chocolate that I have known of and had a very large sale and still is a large seller. It is the only chocolate and quinine liquid pharmaceutical preparation that we carry in stock. And if we were to get an order for a chocolate quinine preparation not specified otherwise, we put in Eli Lilly & Company's Coco-Quinine on that order.

Q. 5. Would you or would you not understand that the Lilly & Company preparation was the preparation ordered?

A. My understanding would be that Eli Lilly & Company's Coco-Quinine was intended.

Q. 6. Do you personally see the orders that come into your store?

A. I see part of them and all doubtful items are referred to me.

Q. 7. Do you have charge of this branch of the business?

A. In a general way. I don't handle all the details of the pharmaceutical business but on any items in which there is any doubt, in the pharmaceutical line particularly, they would be referred to me, that is, they would look to me for instructions as to what items should be used to fill orders of this sort.

Q. 8. Has your store ever received any orders for a preparation known as Quin-Coco to your knowledge?

A. Not to my knowledge.

Q. 9. If an order came into the store for Quin-Coco would it probably be referred to you?

A. Yes, sir.

Q. 10. What is the general reputation in the drug trade of Eli Lilly & Company as manufacturers of pharmaceutical products?

124 By Mr. Rawle: Objected to as irrelevant and immaterial.

A. Second to none.

Direct-examination closed.

No cross-examination.

ROBERT A. HEVENOR.

Subscribed and sworn to before me this 25th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

CORNELIUS P. VAN SCHAAK, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Cornelius P. Van Schaak; age 52; Chicago, Illinois; wholesale druggist; vice-president and secretary of Peter Van Schaak & Sons.

Q. 2. Comparatively speaking, what is the extent of the business of your firm?

A. We have been established since 1844, we are the oldest house in the city of Chicago, in fact one of the oldest in the Mississippi Valley. We are a large house, do a jobbing business in the entire Mississippi Valley and go as far East as the State of Ohio.

Q. 3. Do you handle a product known as Coco-Quinine and if so tell us if you can in reference to its origin, &c.

A. We do handle an item known as Coco-Quinine, so
125 called, that is manufactured by Eli Lilly & Co., of Indianapolis, Indiana. It is the only preparation of the kind that we do carry in stock and we sell quite a large amount during the year.

Q. 4. Did you ever know of a similar preparation prior to the time when this particular product was placed on the market by Eli Lilly & Co.?

A. No.

Q. 5. Have you ever received orders at your store for a product called Quin-Coco?

A. We may have. I don't see all the orders that come into the store. In fact we receive orders for various items, and many of them are outside of our line.

Q. 6. Do you have personal knowledge of any such order having been received at your store?

A. Personally I could not say that I have.

Q. 7. If an order comes to your store for a chocolate quinine liquid preparation by any variation of the name, what would you suppose was intended and what would you supply?

A. We would give Lilly's Coco-Quinine. That is the only item of the kind we carry in stock and it might be ordered by two or three different names.

Q. 8. Do you carry a line of William R. Warner & Company's products?

A. Not an entire line, but their best sellers and specialties.

Q. 9. Do you have a list of such best sellers and specialties?

A. Yes. We embody this list in our annual catalogue on folios 387 and 388. This includes their best sellers and specialties which we have sold for years.

Q. 10. Do you find Quin-Coco listed among the Warner specialties?

A. No, sir.

Q. 11. Do you carry a line of the Searle & Herath products?

A. No, just a few of their specialties.

126 Q. 12. Do you have these listed in your catalogue?

A. We do, yes, at folio 352.

Q. 13. Do you find Quin-Coco in this list?

A. No. I am referring to our catalogue of 1914, latest edition.

Q. 14. Do you object to having the catalogue you hold in your hand offered in evidence?

A. No.

By Mr. Bradford: The catalogue in question is offered in evidence and marked "Complainant's Exhibit, Van Schaack & Sons 1914 Catalogue."

By Mr. Rawle: Objected to as irrelevant.

Q. 15. What is your opinion of the reputation of Eli Lilly & Company as manufacturers of pharmaceutical products?

By Mr. Rowle: Objected to as irrelevant.

A. The highest.

Direct-examination closed.

Cross-examination.

By Mr. Rowle:

X Q. 16. What part does the word "Lilly" in red script upon the labels of Lilly products play as a trade name in the trade?

A. We understand that to be their trade-mark name. Then, too, it more quickly identifies the goods in our stock. I say, "we" speaking for our wholesale house.

X Q. 17. It is well known in the trade and constantly used, is it not, in reference to goods of that concern?

A. As far as I personally know all of their products are identified by that trade-mark, printed on the labels or wrappers, or both.

X Q. 18. The name so printed has a very considerable currency in the trade, has it not? I mean as a trade name.

A. Yes.

Cross-examination closed.

CORNELIUS P. VAN SCHAAK.

Subscribed and sworn to before me this 25th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

By Mr. Bradford: Counsel for complainant produces and offers in evidence a catalogue bearing on the front cover the following inscription:

"The Searle & Hereth Company, Manufacturing Chemists, Chicago, 1906. Like the Scarlet Thread (S. & H. Quality) In Our Bank Notes."

The same being the 1906 trade catalogue of the Searle & Hereth Company, and offers the same in evidence, marking the same "Complaintiff's Exhibit, Searle & Hereth 1906 Catalogue."

Counsel for complainant also produces another copy of a printed list of the products sold by the William R. Warner & Company, headed "Comparative Prices of Special and Miscellaneous Preparations," the same being a list similar to "Complainant's Exhibit, Document No. 3" before introduced, but apparently another edition

thereof, and offers the same in evidence, marking it "Complainant's Exhibit, R. I. Groves Copy of Document No. 3."

By Mr. Rawle: The offer of the S. & H. 1906 catalogue is objected to as irrelevant and not binding on the defendant.

Adjourned to meet at the offices of Bradford & Doolittle, 1451-1455 Lemcke Annex, Indianapolis, Indiana, tomorrow, Friday, March 26th, 1915, at 2.30 p. m.

128 Indianapolis, Indiana,
March 26th, 1915—2.30 p. m.

Met pursuant to adjournment.
Parties present as before.

Dr. WALTER D. HOSKINS, a witness called by and on behalf of the plaintiff having been first duly affirmed, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Walter D. Hoskins; age 43; Indianapolis, Indiana; physician.
Q. 2. Are you familiar with any liquid quinine preparations that include chocolate?
A. Yes, I am.
Q. 3. What?
A. The Lilly's preparation named Coco-Quinine.
Q. 4. Any others?
A. No, I know of no other.
Q. 5. How long have you been familiar with the Lilly preparation referred to?
A. I presume ten or twelve years or since they began to put it on the market.
Q. 6. If your attention were called to a liquid chocolate quinine preparation without any label or other identifying matter, whose preparation would you suppose it to be?
A. I would naturally suppose it to be Lilly's.
Q. 7. Have you prescribed Lilly's Coco-Quinine in your practice?
A. Yes, I have.
129 Q. 8. Have you ever prescribed any other liquid quinine preparation?
A. No, I think not.

Direct-examination closed.

No cross-examination.

WALTER D. HOSKINS.

Subscribed and sworn to before me this 26th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Saturday, March 27th, 1915, at Cape Girardeau, Missouri.

Cape Girardeau, Missouri, March 27th, 1915.

Met pursuant to adjournment, at the Cape Charles Hotel.
Parties present as before.

JOSEPH N. WOLSEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Joseph N. Wolsey; age 30; Cape Girardeau; pharmacist. I am proprietor of the City Drug Store.
Q. 2. Do you handle a product known as Coco-Quinine?
A. Yes, sir.
Q. 3. Whose product do you recognize it to be?
130 A. Lilly's, the Eli Lilly & Company.
Q. 4. How is this product dispensed in your store?
A. As Coco-Quinine and as chocolate quinine. We dispense it on physician's prescriptions and on customers' calls.
Q. 5. In original packages or broken packages.
A. In my own bottles. I dispense it out of the bulk in my own bottles.
Q. 6. If a customer should ask for a chocolate quinine preparation or a Coco-Quinine preparation whose product would you suppose was intended?
A. I would suppose he would want Coco-Quinine, the Eli Lilly Coco-Quinine.
Q. 7. Did you know of any other cocoa or chocolate quinine preparations prior to your knowledge of the Lilly preparation?
A. No, I did not.
Q. 8. Have you ever heard of any other chocolate quinine preparation and if so, whose?
A. Well, yes, the William R. Warner & Co. tried to sell me Quin-Coco, and Milliken has one, too, they both tried to sell me.
Q. 9. Who tried to sell you the Warner preparation?
A. I think his name was Brown. I don't know his initials.
Q. 10. Is he the man who represents William R. Warner & Co. in this territory?
A. Yes, sir.
Q. 11. Do you buy other Warner pharmaceuticals from him?
A. Yes.
Q. 12. What representations did this man make to you in reference to the Quin-Coco?

By Mr. Rawle: Objected to because it does not appear that Brown was the salesman of the defendant, or that he had authority to make representations.

131 A. He said he could sell me the Quin-Coco which was the same as Eli Lilly's Coco-Quinine and at a cheaper price.

Q. 13. Anything else. I mean did he tell you of any other reasons why you should buy it?

By Mr. Rawle: Objected to as leading and improper.

A. That I could make more money on buying it. That it is the same thing and I could dispense it as the same article.

Q. 14. Do you mean that he told you that you could dispense it when the Eli Lilly & Company's Coco-Quinine is called for?

By Mr. Rawle: Objected to as leading.

A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 15. When was this?

A. I can't hardly remember. It was either in November or December, 1914. One of those months.

X Q. 16. Have you ever handled Quin-Coco, Warner?

A. No, sir; I have seen a sample but I have never handled it.

X Q. 17. Ever handled any other chocolate quinine but Lilly's?

A. No, sir. I handled Lilly's only.

X Q. 18. Will you give the exact words this Warner salesman used to you?

By Mr. Bradford: Objected to as immaterial.

A. He said "I would like to sell you a gallon of Quin-Coco. It would be cheaper for you to use than Coco-Quinine and you would make more money off it."

132 X Q. 19. When did you mention this circumstance to the representative of the Lilly Company?

A. I don't remember. It was his next trip around after the Warner man was there. It was J. B. Messenger.

X Q. 20. And he asked you to come here and testify, did he?

A. Yes. He asked me to testify.

X Q. 21. Considering the quantity of Coco-Quinine you dispense, about what proportion do you dispense in your own bottles over the counter and what proportion in prescriptions of doctors?

A. I dispense very little over the counter. I could not tell what proportion. I buy it in gallon lots. A gallon lasts me about sixty days.

X Q. 22. How do you label your bottles when you dispense it in your bottles over the counter?

A. Coco-Quinine, in writing.

X Q. 23. Have you in answer to my questions stated the entire conversation you had with Warner's salesman on the subject of Quin-Coco?

By Mr. Bradford: Objected to as an evident attempt to limit the witness' testimony to what he has said on cross-examination.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 24. Have you ever had a call for Quin-Coco on a physician's prescription?

A. No, sir.

R. D. Q. 25. Have you ever had a call for Quin-Coco by a customer over the counter?

A. No, sir.

R. D. Q. 26. In your direct-examination in answer to my questions you stated that Warner's representative told you that you could use Quin-Coco when Coco-Quinine was called for. In answer to Mr. Rawle's last question you stated that what you said in reference to the conversation between yourself and the Warner representative in response to the question propounded to you by him was all that the Warner representative said. In answer to his cross-question you omitted to say that the Warner representative told you that you could use the Quin-Coco when the Coco-Quinine was called for. Please make any explanation you care to in reference to this seeming discrepancy between what you said in answer to my question and what you said in answer to Mr. Rawle's question?

By Mr. Rawle: The question is objected to as grossly leading and improper for re-direct-examination and because it wrongly quotes the testimony.

A. Well, the Warner man said he wanted to sell me a gallon of the Quin-Coco, that I could make more money out of it than I could selling and dispensing the Eli Lilly's Coco-Quinine.

R. D. Q. 27. In answer to Q. 12 you stated "He said he could sell me the Quin-Coco which was the same as Eli Lilly's Coco-Quinine and at a cheaper price." Do you wish to withdraw this statement?

By Mr. Rawle: The question is objected to as improper re-direct-examination and as an attempt to lead the witness.

A. Where I stated the cheaper product there is what we will let stand.

R. D. Q. 28. By Q. 13 I asked you if he told you of any other reason why you should buy it. You replied "That I could make more money on buying it, that it is the same thing and I could dispense it as the same article." Is this correct?

By Mr. Rawle: The question is objected to as improper for re-direct-examination, the witness having already testified as to

134 what was said at the interview both on direct and on cross-examination.

A. Yes, sir.

R. D. Q. 29. My questions are for the purpose of clearing up a seeming confusion between your direct and your cross-examination. I want to ask you again did or did not the Warner representative tell you that you could furnish Quin-Cocoa when Coco-Quinine was called for?

By Mr. Rawle: The question is objected to as leading and as improper re-direct-examination.

A. Yes, sir.

Re-direct-examination closed.

By Mr. Rawle: I give notice that I shall move to strike out the parts of the testimony of this witness that have been objected to and without waiving his objections re-cross-examines as follows:

Recross-examination.

By Mr. Rawle:

R. X Q. 30. Don't you sometimes have a call for a chocolate quinine preparation?

By Mr. Bradford: Objected to as not re-cross-examination.

A. No, sir; I have none.

R. X Q. 31. Don't you sometimes have a call for chocolate quinine?

Same objection.

A. I don't think so.

R. X Q. 32. Sure you don't?

A. I would not be right sure, no, sir; I could not keep track of all calls.

R. X Q. 33. Think a moment and answer the question

135 whether you don't sometimes have a call for chocolate quinine?

A. I have calls for Coco-Quinine.

R. X Q. 34. But not for chocolate quinine?

A. I may have had calls for chocolate quinine, but not lately.

R. X Q. 35. If the Warner salesman said to you that you could dispense Quin-Coco "as the same article," will you please give the exact words in which he made that statement?

By Mr. Bradford: Objected to as immaterial.

A. He said that I could buy a gallon of it and use it for the same purpose as Coco-Quinine for less money. I think that is the exact words. It is hard to remember when not expecting anything like this.

R. X Q. 36. Then that gives your best recollection, does it?
A. Yes, sir.
R. X Q. 37. And you now state it in that way in preference to previous statements made by you. Is that correct?

By Mr. Bradford: Objected to as another attempt on the part of counsel to twist the meaning of the witness' frank answers.

A. Yes, sir; I guess that is correct.

JOSEPH N. WOLSEY.

Subscribed and sworn to before me this 27th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

JAMES A. KINDER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

136 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. James A. Kinder; age 35; Cape Girardeau; retail druggist; manager of the firm of Miller & Kinder, and a partner.
Q. 2. Do you handle a product known as Coco-Quinine in your store?
A. Yes, sir.
Q. 3. Please state what you know in reference to this product?
A. In my experience as a retail druggist for fourteen years I have regarded Lilly's Coco-Quinine as the pioneer or leader of all chocolate quinine syrups, and naturally when chocolate quinine is called for I supply Lilly's and Lilly's only, which we have carried for years.
Q. 4. By Lilly's do you mean Eli Lilly & Co., the complainant herein?
A. Yes, sir.
Q. 5. How do you dispense Coco-Quinine?
A. On physicians' prescriptions and to the retail trade.
Q. 6. In what kind of containers and under what labels?
A. Ordinary prescription bottles and our ordinary stock labels and prescription labels.
Q. 7. Do you know anything concerning other chocolate quinine preparations and if so what?
A. I know probably two other brands of chocolate quinine; one that has probably been brought to our attention more recently and more forcibly than any of the others is Quin-Coco, which a Mr. Brown, salesman for Warner & Co., showed us. The other which was made by Milliken & Co., of St. Louis, I have not seen for a number of years.
Q. 8. What was the occasion of Mr. Brown showing you the Warner & Co.'s product called Quin-Coco?
137 A. He was making one of his regular trips calling on the

trade, I presume, and upon learning that we were using a great quantity of Lilly's Cocoa-Quinine, he showed us his preparation and called our attention to the fact that it was a preparation that we could easily use in the place of Cocoa-Quinine and save considerable money in our purchases. He stated that his company had by the work on this preparation caused Lilly to thin down their Cocoa-Quinine syrup in order to meet the efforts Warner & Co. were making.

Q. 9. Have you ever received a prescription calling for Quin-Coa?

A. No, sir; we never did.

Q. 10. Have you ever received a call over the counter for Quin-Coa?

A. No, sir.

Q. 11. How did Mr. Brown expect you to sell Quin-Coa if you were receiving no calls for it?

By Mr. Rawle: Objected to as incompetent and as asking the witness to state what the salesman had in his mind and as leading, and because the only proper question is to ask what was said by the salesman.

By Mr. Bradford: I will restate the question.

Q. 12. What did Mr. Brown state, if anything, as his reason in expecting you to sell Quin-Coa, if you had no calls for it?

By Mr. Rawle: Objected to because the witness has already said what was said by the salesman and as leading and as improper.

A. He stated that it had been and was being successfully pushed whenever Cocoa-Quinine was having a good sale; that they were identical preparations and could not be distinguished.

Q. 13. But how could Quin-Coa be sold if Quin-Coa was not called for?

138 By Mr. Rawle: Objected to as leading and as incompetent and because the witness has stated what was said by the salesman.

A. That was the question that was never answered in my mind.

Q. 14. Did Mr. Brown attempt to answer such a question and if so, how?

Same objections.

A. I don't remember that he did.

Q. 15. Did he or did he not explain to you how you could expect to sell Quin-Coa and if so what did he say?

By Mr. Rawle: Objected to as leading, as incompetent and because the witness has already stated the substance of what was said at the interview.

A. He simply suggested that we could use it whenever there was a demand for Cocoa-Quinine, and that it could not be told from Cocoa-Quinine.

Q. 16. How long have you been handling Cocoa-Quinine?

A. About fourteen years.

Cross-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. Do customers ever call at your counter for a chocolate quinine preparation or a liquid quinine preparation without giving the trade name of the preparation?

A. Yes, sir; I think so.

X Q. 18. It is not uncommon?

A. Yes, it is uncommon.

X Q. 19. And it would be honest in a druggist so far as you know to sell such a customer Quinol'ene at least if Quinol'ene is as good a preparation as the Warner salesman told you it was?

By Mr. Bradford: Objected to as immaterial.

A. I think so.

X Q. 20. But if a customer calls for Cocoquinine would it, in our opinion, be the part of an honest druggist to sell some other preparation to that customer?

A. I do not.

X Q. 21. You would consider it as not an honest practice, would you not?

A. Yes, sir.

X Q. 22. And you don't do it.

A. I do not.

X Q. 23. And if a salesman suggested to you to do such a like thing you wouldn't like it, would you?

A. I didn't like it, no, sir.

X Q. 24. Would you resent it?

A. I resented it to the extent of refusing to follow his suggestion.

X Q. 25. Did you tell him that you would resent it?

A. No, sir, I did not.

X Q. 26. In answer to Mr. Bradford's question you testified that the Warner salesman "simply suggested that we could use it when we have had a demand for Cocoquinine."

Is that the suggestion he made?

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R D Q. 27. If a customer asks for a chocolate quinine or a liquid quinine preparation by any other than the trade name, is it understood that any particular preparation is intended, and if so, what?

140 A. I do, I understand them to want Coco-Quinine.

J. A. KINDER.

Subscribed and sworn to before me this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

GEORGE W. WALKER, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. George W. Walker; age, 39; Cape Girardeau; Physician.

Q. 2. In your practice do you ever use or prescribe a pharmaceutical product known as Coco-Quinine?

A. I do.

Q. 3. Whose product do you recognize this to be?

A. I have been in the habit of using only one Coco-Quinine and when I write Coco-Quinine I mean the one which I am accustomed to which is the Lilly preparation.

Q. 4. How do you usually write your prescriptions for Coco-Quinine?

A. I don't specify, I just write Coco-Quinine.

Q. 5. And what does that mean?

A. I mean Lilly's Coco-Quinine.

Q. 6. Have you ever used any other chocolate quinine preparation in your practice?

A. I have never used any other. I have never specified any other. It has been dispensed once or twice I think.

Q. 7. What do you mean by "it?"

141 A. Well I mean the other preparation of Coco-Quinine, other than Lilly's.

By Mr. Rrawle: The answer is objected to as hearsay.

Q. 8. Do you know whose make this other was?

By Mr. Rawle: Objected to as hearsay unless the witness testified to facts known physically by him.

A. I recall one prescription that there was a preparation put up by John T. Milliken. I examined the medicine and preparation and knew it wasn't the preparation to which I was accustomed.

Q. 9. Any others?

A. That is the only time I recall that I ever examined the preparation to know what it was.

Q. 10. How did you determine that it was Milliken's?

A. I asked the druggist who dispensed it.

By Mr. Rawle: Question and answer objected to as irrelevant and hearsay.

Q. 11. In your judgment would any prescription written for Coco-Quinine mean Lilly's product and none other?
A. It would.

Direct-examination closed.

No Cross-examination.

GEORGE W. WALKER.

Subscribed and sworn to before me this 27th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Cairo, Illinois, this evening at 8 o'clock, March 27th, 1915.

142 Cairo, Illinois, March 27th, 1915—8 p. m.

Met pursuant to adjournment at the Halliday Hotel, Cairo, Illinois.

Parties present as before.

HARRY W. SCHUH, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Harry W. Schuh; age, 63; Illinois; Druggist, Wholesale and Retail; that is I have a retail store and am also Manager of the Schuh Drug Company, Wholesale Druggists.
Q. 2. Do you know anything of a product called Coco-Quinine, and if so, will you tell us what you know about it?
A. Coco-Quinine I know to be manufactured only by the Eli Lilly & Co., of Indianapolis, Indiana. It is a tasteless quinine, flavored with cocoa, or chocolate.
Q. 3. Do you handle this product in the wholesale drug house of the Schuh Drug Company?
A. Yes, sir.
Q. 4. Do you also handle it in your retail store?
A. Yes, sir.
Q. 5. What territory do you cover in your wholesale or jobbing business?
A. Southeastern Missouri, Arkansas, Southern Illinois, Kentucky, Tennessee, and Mississippi.
Q. 6. Do you sell a line of pharmaceuticals to the retail trade throughout this territory?
A. Yes, sir.
143 Q. 7. Is the preparation known as Coco-Quinine included in such line?
A. Yes, sir.

Q. 8. Have you ever had a call from the retail trade for a preparation called Quin-Coco?

A. No, sir.

Q. 9. How do you dispense the Coco-Quinine in your retail store?

A. On prescriptions and over the counter, both ways.

Q. 10. In what kind of containers?

A. Our own prescription bottles.

Q. 11. Have you ever had a prescription for Quin-Coco?

A. No, sir.

Q. 12. Have you ever had a call over the counter for Quin-Coco?

A. No, sir.

Q. 13. Suppose a customer asked for a chocolate quinine preparation by some other name than the recognized trade name, what preparation would you suppose was asked for?

A. Eli Lilly's Coco-Quinine.

Q. 14. How long have you handled Coco-Quinine?

A. I should judge fifteen years.

Q. 15. At the time you begun handling Coco-Quinine, was there, to your knowledge, any other chocolate quinine preparation on the market?

A. Not that I know of.

Q. 16. What is your opinion of Eli Lilly & Co. as a manufacturer of pharmaceuticals?

By Mr. Rawlings: Objected to as irrelevant.

A. Very good.

Q. 17. So far as you know has the use of this preparation been satisfactory to the physicians and others who have purchased it?

A. Yes, sir, very satisfactory.

Direct-examination closed.

144 Cross-examination.

By Mr. Rawle:

X Q. 18. I understand that Lilly's Coco-Quinine is the only chocolate quinine liquid preparation you have handled?

A. Yes, sir.

X Q. 19. And when a customer calls for a chocolate quinine liquid preparation he gets Lilly's Coco-Quinine?

A. Yes, sir.

X Q. 20. Might not prescriptions or customers have called for some other liquid quinine preparation at your retail store during your absence?

A. I think not.

X Q. 21. You are what is called a jobber of pharmaceutical preparations, are you not?

A. Yes, sir.

X Q. 22. And Lilly sells only to jobbers and not to retailers?

A. Only to jobbers.

X Q. 23. And Warner & Co. sell only to retailers and not to jobbers?

A. It is my opinion that they sell to jobbers, physicians and retail druggists.

HARRY W. SCHUH.

Subscribed and sworn to before me, this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

HERBERT N. HENCKELL, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

145 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Herbert N. Henckell; age, 36; Cairo, Ill.; Druggist, a partner in Henckell's drug store.

Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine, at your store?

A. Yes, sir.

Q. 3. Who is the manufacturer of this product, if you know?

A. Eli Lilly & Co.

Q. 4. How do you dispense it?

A. On prescriptions and to the trade when they call for it.

Q. 5. How are the prescriptions commonly written?

A. For Coco-Quinine.

Q. 6. How do your customers ask for it when it is asked for over the counter?

A. Coco-Quinine.

Q. 7. How long have you handled this product?

A. Seven or eight years.

Q. 8. About what is the extent of the demands for it at your store?

A. We use about five pints a month.

Q. 10. Do you know of any other chocolate quinine preparation on the market?

A. I have never used any nor seen any, but have had them offered to me for sale.

Q. 11. Please explain as to the offers of other quinine products to you?

By Mr. Rawle: Objected to as inadmissible and irrelevant.

A. I have had a chocolate quinine offered me by the Pfeiffer Chemical Company, by a salesman for them, as being a quinine and syrup preparation.

By Mr. Rawle: The answer is objected to as irrelevant.

146 Q. 12. Who was this salesman?

(Same objection.)

A. Mr. Baldwin.

Q. 13. What did Mr. Baldwin tell you about the preparation he offered you?

(Same objection.)

A. That it was a preparation equal to any other cocoa and quinine preparation on the market and considerably cheaper.

Q. 14. Anything else?

(Same objection.)

A. That it could be used whenever a chocolate quinine preparation was required.

Q. 15. Did he say anything to you about Coco-Quinine?

(Objected to as irrelevant and as leading.)

A. I was asked whose Coco-Quinine preparation I used. I told him Eli Lilly's.

Q. 16. Won't you relate the whole conversation?

A. After I had told him I used Lilly's he told me that his preparation would serve the purpose of the Coco-Quinine, and I could save considerable money by using his.

Q. 17. Was anything said about substituting one for the other?

(Objected to as irrelevant and as leading.)

A. Nothing further was said by him after I told him I would use no other preparation of Coco-Quinine except that made by Eli Lilly & Co.

Q. 18. What was your reason for taking this position with him?

(Objected to as irrelevant, and because the witness' reasons for taking any position are not material to this issue.)

147 A. I don't think when a customer asks for a cocoa or chocolate quinine that they mean any other but that made by Eli Lilly & Co.

Q. 19. Could you identify the Lilly preparation by any other means than its name?

A. No, sir, I don't think I could. I have never tasted nor seen any other and I could not say truthfully that I could identify any other prepartion from the Coco-Quinine.

Direct-examination closed.

No cross-examination.

HERBERT N. HENCKELL.

Subscribed and sworn to before me this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILL J. BRYANT, a winess, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Will J. Bryant; age, 37; Cairo, Ill.; Pharmacist. I am a partner in the Henckell Drug Store.
Q. 2. How long have you been with the Henckell Drug Store and where were you employed prior to that time?
A. I have been with the Henckell Drug Store seven months. Prior to that time I was employed by the Schuh Drug Store.
Q. 3. In what capacity?
A. Well, I was laboratorian, and buyer.
148 Q. 4. Did you have any knowledge of the orders coming into the store for goods?
A. I filled them all.
Q. 5. Did you handle a pharmaceutical product known as Coco-Quinine while you were with the store, and if so, what can you tell us about it?
A. I did. The Schuh Drug Company bought and sold probably ten or fifteen five pint bottles, five to eight one gallon bottles, and I should judge about a dozen pints a week. I did the buying in that department.
Q. 6. The quantity stated is about an average week's business while you were with them?
A. Yes, sir.
Q. 7. Did you ever receive any orders from the retail trade for Quin-Coco while you were with the Schuh Drug Co.?
A. I don't think so.
Q. 8. Did you ever receive any orders for a chocolate quinine preparation by any other name than Coco-Quinine?
A. I did.
Q. 9. Please explain?

(Objected to as irrelevant.)

A. We occasionally received orders for chocolate quinine. I don't remember any other names at present that were given. They were always filled with Lilly's Coco-Quinine. In fact I don't remember of any other preparation of chocolate quinine that we ever had in stock except Lilly's Coco-Quinine. I don't remember of ever having had a call for Quin-Coco, but it is possible I might have had if there is such a preparation on the market as every jobber is liable to have.
Q. 10. Have you ever had anything to do with any other chocolate quinine preparation than Coco-Quinine?
A. I never have.
149 Q. 11. Was this preparation handled by the Schuh Drug Co. all of the time you were with them?
A. Yes, sir.

Direct examination closed.

No Cross-examination. WILL J. BRYANT.

Subscribed and sworn to before me this 27th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

JOHN B. MESSENGER, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. John B. Messenger; age, 42; Cairo, Illinois; Traveling Salesman for Eli Lilly & Co.
Q. 2. How long have you been so employed by Eli Lilly & Co.?
A. Seventeen years.
Q 3. What are your duties in the position you hold with this house?
A. Calling on the retail trade and jobbers, and detailing physicians with samples of Lilly's products.
Q. 4. Do you know anything concerning the product Coco-Quinine, when it was put on the market, &c.? Please state in narrative form what you know on this subject.
A. I was in the employ of Eli Lilly & Co. when the article was first introduced to the trade and I sold Coco-Quinine quite a number of years before there ever was a substitute offered to the
150 trade, that is to my knowledge, never in my territory, but frequently had the druggists often say to me that Eli Lilly & Co. had such a fine article there and are creating such a demand for it that it will be only a question of time that the preparation will be greatly substituted, which it has been.

I know it to be a fact that lots of druggists carry a substitute of Coco-Quinine called Quin-Coco that they use on prescriptions where the physicians have written for Coco-Quinine. I have also had doctors state to me that in using the substitute for Coco-Quinine it has caused the patient to become nauseated and sick at the stomach owing to the fact that the preparation contained so much cocoa butter and starch and that they had fallen out with Coco-Quinine thinking that was the article they were using and when it was brought to their attention that it was not Coco-Quinine that was being used and finally got some of the original Coco-Quinine that the results were very much different in favor of the patient. And I know it to be a fact that this substitution has cost the original article of Eli Lilly & Company's Coco-Quinine a great loss in favor with the physicians.

I have taken the matter up, I have taken issue with the druggists that have told me that they bought a substitute for Coco-Quinine and asked them why they would not give us the business on the original and invariably their reply was that it was more money to them to sell the substitute than the original Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay and as inadmissible.

Q. 5. Will you give the name of the physician who had this experience with a substitute for Coco-Quinine?

By Mr. Rawle: Objected to as calling for hearsay evidence.

151 A. H. R. Read, Charleston, Missouri.

Q. 6. What territory do you cover as the representative of Eli Lilly & Co.?

A. Southern Illinois, Southeast Missouri, Northeast Arkansas, and Western Kentucky.

Direct-examination closed.

Cross-examination, without waiving objection.

By Mr. Rawle:

X Q. 7. Do you consider that "lots of druggists" who "carry a substitute of Coco-Quinine, called Quin-Coco that they use on prescriptions that physicians have written for Coco-Quinine," are, in so doing, acting as honest druggists?

A. I would not consider it being honest, no.

X Q. 8. Then you are impugning the honesty of "lots of druggists" in your territory, are you not?

A. His honesty on that one proposition, I would, yes.

X Q. 9. Do you mean by "would" that you "do" impugn their honesty?

A. On that one proposition.

X Q. 10. Give me an approximate statement of the number of retail druggists in your territory?

A. I would say that there are two hundred and fifty druggists.

X Q 11. Do you mean retail druggists?

A. I will say I call on two hundred and fifty retail druggists approximately. There may be more. That is a very close estimate.

X Q. 12. By the words "lots of druggists" used in your answer to Q. 4, how many druggists do you mean?

A. Well, I don't believe that there are over twenty druggists in my territory that use anything but Coco-Quinine, Lilly.

X Q. 13. And do these twenty retail druggists constitute the class whom you have designated in your answer to Q. 4 as "lots of druggists?"

152 A. Yes, I do.

X Q. 14. (Question repeated.)

A. Yes.

X Q. 15. Then I understand that in respect of all the retail druggists in your territory, some twenty in number who handle and sell Quin-Coco made by Warner & Co., you impugn their honesty in their business?

By Mr. Bradford: The question is objected to as not justified by the witness' previous testimony on this subject.

A. I wouldn't say that they all handle Quin-Coco. There are other substitutes besides Quin-Coco.

X Q. 16. What do you mean by "substitutes?"

A. Something to take the place of Coco-Quinine.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 17. What do you mean by "take the place of" in your last answer?

By Mr. Rawle: Objected to as not proper redirect-examination.

A. Any preparation that will take the place of Coco-Quinine when Coco-Quinine is prescribed.

JOHN B. MESSENGER.

Subscribed and sworn to before me this 27th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned until Monday, March 29th, 1915, at Hotel Hermitage, Nashville, Tenn., at 9:00 a. m.

153 Nashville, Tenn.,
Hermitage Hotel, March 29th, 1915—9.00 a. m.

Met pursuant to adjournment, at the Hermitage Hotel, Nashville, Tenn., Monday, March 29th, 1915, at 9.00 a. m.

Parties present as before.

CHESLEY W. JENNINGS, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Chesley W. Jennings; age, 45; Nashville, Tenn.; Druggist, Proprietor of the Jennings Pharmacy of Nashville, Tenn.

Q. 2. Please state if you handle a pharmaceutical product known as Coco-Quinine, and if so, tell us what you can about it?

A. We have it in stock. It is a preparation made by Eli Lilly & Co., prescribed by physicians and also called for by the public. We have been handling this product for ten years or more.

Q. 3. How is this product dispensed in your store?

A. Mostly in our own prescription bottles, filled from the original packages.

Q. 4. How is this product called for on the prescriptions you receive?

A. Sometimes it would be Coco-Quinine, say about four ounces, then sometimes Coco-Quinine (Lilly).

Q. 5. Do the physicians designate the product on their prescriptions by any other name than by Coco-Quinine?

154 By Mr. Rawle: Objected to as irrelevant.

A. No, sir.

Q. 6. How do customers call for it over the counter?

A. Coco-Quinine.

Q. 7. Ever by any other names?

A. Sometimes by "Chocolate Quinine."

Q. 8. What product do you understand to be intended when it is asked for by any of these names?

A. Coco-Quinine.

Q. 9. What is the comparative extent or size of your business?

A. Prescription business?

Q. 10. Yes, prescription business?

A. Our prescriptions run from something like fifteen to twenty thousand a year.

Q. 11. Do they come from all parts of this particular locality?

A. Yes, sir.

Q. 12. Have you ever had a prescription come into your store written for Quin-Coco?

A. If I have I don't remember it.

Q. 13. Would you be likely to know?

A. Yes, sir.

Q. 14. Have you ever had a customer come into the store and ask for Quin-Coco?

A. No, sir. If I have I don't know it. I have four or five clerks.

Q. 15. So far as your personal knowledge goes then your store has never received a prescription calling for Quin-Coco or a call for Quin-Coco from a customer?

By Mr. Rawle: Objected to as already answered.

A. I never have, not that I know of.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 16. When a customer calls for a preparation of chocolate quinine you sell them Coco-Quinine, Lilly?

155 A. Yes, sir.

X Q. 17. You have no knowledge of what they want, but you merely state that that is what you do?

A. We ask them if it is Coco-Quinine and they say "Yes, I guess it is, it is that chocolate quinine, and is labeled Coco-Quinine."

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 18. When a customer asks for chocolate quinine, why do you understand that they mean "Lilly's Coco-Quinine?"

A. That is the only one we ever knew of being a chocolate quinine.

R. D. Q. 19. Do you handle any other tasteless or sweet liquid quinine preparation?

A. Yes, sir.

R. D. Q. 20. What?

A. A preparation called Febreline. I don't remember the manufacturer's name.

R. D. Q. 21. What is its flavor?

A. I think it is orange.

R. D. Q. 22. What is its color?

A. A cloudy syrup. It is nearly white.

By Mr. Rawle: These questions and answers are objected to as irrelevant and immaterial.

CHESLEY W. JENNINGS.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

ALVA LEE KELTON, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows,
156 in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Alva Lee Kelton; age, 40; 1517 Forrest Avenue, Nashville, Tenn.; Assistant General Manager Phœnix Mutual Life Insurance Co.

Q. 2. How long have you been in your present business?

A. Sixty days.

Q. 3. In what business were you engaged prior to that time?

A. I was a commercial traveler, for the S. Pfeiffer Manufacturing Company, of St. Louis, Missouri, for two years previous. For ten years previous I represented Pfeiffer Chemical Company, of St. Louis, Missouri, as a commercial traveler. They manufacture a line of non-secret preparations, pharmaceuticals, patent medicines, toilet articles, perfumes and so forth.

Q. 4. Among such preparations in the line mentioned was or was not there one called Quin-Coco?

A. Yes, sir.

Q. 5. Did you sell Quin-Coco among the other products which you handled?

A. I did.

Q. 6. What territory did you cover when representing the Pfeiffer Chemical Company?

A. Kentucky and Tennessee for five years and Tennessee alone the balance of my experience as a salesman for the Pfeiffer Chemical Company.

Q. 7. What were your usual representations to the trade when soliciting orders for Quin-Coco?

By Mr. Rawle: Objected to as irrelevant and inadmissible and because no acts of the company named by the witness could bind the defendant and affect his rights. And also because the acts
157 of the witness called for by the question are not in any way connected with the defendant.

A. I always demonstrated Quin-Coco as a preparation similar to Coco-Quinine, showing to them that the Pfeiffer Chemical Company (or the Searle Hereth Company) product was even a better preparation to my mind than the Coco-Quinine which the trade had formerly sold. I demonstrated this by showing that Quin-Coco would not coagulate in the bottom of the container as easily as the Coco-Quinine.

I also showed the difference in price invariably quoting our gallon price against the Eli Lilly & Co. five pound price. In big buyers I tried to induce them to take advantage of our five gallon deal, thus reducing the price to five cents lower per gallon than the Coco-Quinine is in five pound lots. This, of course, was only to dealers who could handle that quantity and always to retail druggists only.

I made a specialty of Quin-Coco from the fact that I found it to be the very best "repeater" we had in the pharmaceutical line. When a customer began buying this product in five pound lots he invariably bought it later in larger quantities, almost invariably.

I would state that "five pints" and "five pounds" are synonymous in pharmaceutical terms.

Q. 8. When did you begin the sale of Quin-Coco to the trade?

A. In 1907.

Q. 9. Do you know anything about the early history of the manufacture of Quin-Coco, and if so, will you relate it?

By Mr. Rawle: A general objection upon the ground above stated is made to the foregoing questions and answers and all others along this line, counsel agreeing that it may be considered as made to all such questions.

A. Mr. H. Pfeiffer who was the original Pfeiffer of the
158 Allan-Pfeiffer Chemical Company was later the founder of the Pfeiffer Chemical Company which firm I represented during the best years of my life. Mr. Pfeiffer and I were warm personal friends, besides my being a representative of his company. He often spoke to me about getting up a Quin-Coco, and same was listed in an old Pfeiffer Chemical Company catalogue, but they did not perfect the preparation. Later when they purchased the Searle & Hereth Company, Chicago, Quin-Coco was floated on the market. It was a winner from the start, from the fact that the trade was accustomed to a preparation of this kind and were eager to buy something at a cheaper price, quality being considered. As stated in a

former answer I considered then and do now consider Quin-Coco a superior preparation to Coco-Quinine.

Q. 10. In your experience with the Pfeiffer Chemical Company, did you learn of any Quin-Coco preparation manufactured by the Searle and Hereth Company prior to the date it was taken over by the Pfeiffer Chemical Company?

A. I did not.

Q. 11. In the work of selling Quin-Coco did you tell the druggists that Quin-Coco could be supplied when Coco-Quinine was called for, or to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to because the witness has shown no connection with the defendant and no authority from the defendant in the matters called for by the question.

A. I did. Not only so, but as stated in a former answer I demonstrated the difference in price and quality, urging upon him to at least give Quin-Coco a fair trial. That my experience with the trade was almost invariably that Quin-Coco was a most excellent "repeater."

Q. 12. For the benefit of the court will you not explain
159 what is understood in the trade by the term "repeater?"

A. By the term "repeater" in the sense used concerning Quin-Coco I have reference to the fact that it would be reordered time and again. I also used the word "replacer" which is a phrase used by pharmaceutical houses and salesmen when placing an article on the market at a cheaper price than the one which is called the "original." Quin-Coco therefore was a "replacer" in the salesman's mind (I speak of my own experience) for Eli Lilly & Company's former manufactured product known to the trade the country over as Coco-Quinine.

Q. 13. Was Quin-Coco ever sold by you to the trade with the understanding that it should be sold only when Quin-Coco should be called for by prescriptions or the retailers' customers?

By Mr. Rawle: The question is objected to on the ground that the witness cannot testify to understandings but to what was said at any given time.

A. Not by any means. I invariably sold Quin-Coco with the idea that it was to give the retail druggists whose profits are few and far between anyway a larger profit, demonstrating as above stated that if Coco-Quinine was called for to influence the customer to take the Quin-Coco instead. If the consumer gets a better product in my mind and the druggists make a better profit, both are thereby benefited.

Q. 14. From your experience in the sale of this product and your knowledge of the trade conditions when you were engaged in this business what proportion of the Quin-Coco you sold would you say was resold to the customers to supply the demand for Quin-Coco and what proportion to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to because calling necessarily for
160 hearsay and for the witness' guess on a subject in which he

could not base his answer upon facts, but only upon estimates, or inferences.

A. I would most positively state that in my long experience in selling Quin-Coco that it was resold as it was bought—to replace Coco-Quinine, and that in almost every instance, at my suggestion, and demonstration, it was bought for the purpose of replacing Coco-Quinine. Therefore, it was almost in toto, according to various letters and personal talks with druggists, sold as a substitute for Coco-Quinine. In fact I sold a great deal more Quin-Coco in my territory than any three representatives, I would judge, representing Eli Lilly & Co. I say this without fear of successful contradiction.

Q. 15. Do you know anything about William R. Warner & Co., and what relations exist between that company and the Pfeiffer Chemical Company?

By Mr. Rawle: Objected to because the question asks for facts of which the witness cannot have a complete understanding having legal value.

A. The consolidation of the William R. Warner & Co. with the Pfeiffer Chemical Company took place while I was a representative of the latter concern. Mr. H. Pfeiffer, as stated in previous answers, and I were warm personal friends. Consequently he told me much concerning the business of the company. I knew that when the Pfeiffer Chemical Company took hold of any concern they always secured a controlling interest in same before they would make a final trade between the companies.

Q. 16. Can you state when or about when this consolidation took place?

Q. My recollection is that it was in 1908.

Q. 17. Following such consolidation was the Warner line added to the other lines of products you were selling?

161 A. It was. When any concern was bought over by the Pfeiffer Chemical Company, this line was added to the peddler's pack carried by the salesman.

Q. 18. To this extent, then, you represented the William R. Warner & Co., as well as the Pfeiffer Chemical Company, did you not?

A. I did.

Q. 19. I call your attention to a paper marked "Complainant's Exhibit No. 3," and ask you if you recognize it and what it is?

A. It brings tears of pleasure and regret and several other "res" to see this familiar paper before me. It seems like shaking hands with an old friend. It is, as before stated, what was known to me as our "replacer" list, and I always invariably tried to knock the eye out of every product known on this "replacer" list as the original and sell our own "replacers," which were printed on said list.

Q. 20. What information does that list give you relative to Coco-Quinine and Quin-Coco?

A. The paper was always used by me to demonstrate the difference in the price between Quin-Coco and Coco-Quinine.

Q. 21. Were these lists sent to their traveling salesmen by the Pfeiffer Chemical Co., and the William R. Warner Co.?

By Mr. Rawle: Objected to unless the witness states that he knows that they were sent to each and to how many other traveling salesmen than himself, and unless the witness confines himself to such statement of actual facts known to him.

A. They most positively were. The Pfeiffer Chemical Company (and William R. Warner & Co.) never did anything by halves. When one salesman got a loaf all got loaves. When one salesman got anything added to the line, each and every salesman got
162 the same thing. Circular letters were sent out every week, showing what was going on over the entire territory, so that I am sure I am in a position to answer above positively.

By Mr. Rawle: Answer is objected to as hearsay.

Q. 22. Do you have any knowledge of the number of items listed by the Pfeiffer Chemical Company—William R. Warner Company combination, and if so, about how many?

A. When I severed my connection with the Pfeiffer Chemical Company and William R. Warner Company the entire combined lines amounted to approximately sixteen thousand items.

Q. 23. What is your opinion of the standing of the house of Eli Lilly & Co.?

A. I have always heard Mr. Pfeiffer (and I trust I will be pardoned for referring to him so often) refer to Eli Lilly & Co. as the most ethical pharmaceutical house in the United States. I heartily coincide with him for I have never seen anything derogatory to his opinion, and, as I was tutored by Mr. Pfeiffer I naturally imbibed some of his good judgment.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 24. Were you tutored by Mr. H. Pfeiffer in the ethics of your business as salesman for his houses?

A. I was.

X Q. 25. Were his teachings ethical in your opinion?

A. Absolutely.

X Q. 26. Did you invariably conduct the business as salesman in according with those ethics?

A. As near as possibly, that is, I most certainly had ideas of my own as a salesman, for no man can be truly successful by
163 taking another man's ideas and following them in toto.

X Q. 27. I need hardly ask you whether you considered your own ideas of the ethics of the business as being truly ethical? Do you so consider them?

A. In the strictest sense of the word "ethics" as used by Mr. H. Pfeiffer concerning Eli Lilly & Co., I do not consider the Pfeiffer Chemical Company and William R. Warner & Co., as ethical as they should be. Mr. H. Pfeiffer while he was president of the Pfeiffer Chemical Company adhered to his own ideas of ethics which, as above stated, were correct. Later on, when the business grew to such immense proportions—even far beyond his own expectations, the idea of ethics strictly speaking passed from under the personal supervision of Mr. H. Pfeiffer.

X Q. 28. By the word "repeater" used by you I understand you to mean a preparation which, once sold to a druggist, would probably be so approved by him as to lead him to buy it a second time and thereafter?

A. That is my meaning.

X Q. 29. By "replacer" I understand you to mean a preparation similar to another preparation, in medical effect, which could be used in place of that other preparation with like medical effect with that other preparation. Is that correct?

A. By the term "replacer" as above stated, I always had reference to a preparation which in class and quality was similar to the original, the price however, invariably being lower than the original manufactured article.

X Q. 30. Is the element of a lower price an essential element of the term, necessarily?

A. Absolutely. This was one talking point I always used to induce the trade to buy the "replacer" instead of the original. The old term "just as good" was used when the Pilgrim Fathers 164 landed at Plymouth Rock in 1620. Unfortunately for me, my experience was in the whirlwind campaign of the twentieth century where brighter and newer terms must always be produced in order to induce a buyer or make him susceptible to the power of suggestion.

X Q. 31. Might not the term "replacer" be used in respect of a similar preparation with which your preparation came in competition, notwithstanding the fact that the other preparation with which yours competed might not have preceded yours on the market?

A. The term "replacer" as I used it invariably has reference to a preparation which has been manufactured at a later date than a similar preparation manufactured and introduced prior to the one termed "replacer."

X Q. 32. If you came into competition with another article which had been first introduced on the market subsequently to the introduction of your article, have you any similar term to apply to your article in such case?

A. I would call our article in that instance the original and the subsequent article the "replacer."

X Q. 33. Then in making sales of Quin-Coco to the retail druggists your effort was to induce them to influence their customers to use Quin-Coco, Searle & Hereth, in place of Coco-Quinine, Lilly?

By Mr. Bradford: Objected to as not justified by the witness' testimony on direct-examination.

A. Invariably so.

X Q. 34. And that is all that you attempted to do?

Same objection.

A. That was not all I attempted to do, but it was the foundation for getting an order from the fact that I could never have sold any Quin-Coco had it not been for the former birth of Coco-Quinine. I have previously stated that I believed then and believe now
165 that Quin-Coco was and is a superior preparation to the Coco-Quinine manufactured by Eli Lilly & Co. The price also, as above stated, was the chief club I used with which to hammer against Coco-Quinine.

X Q. 35. I hope you will excuse me for asking you this question. I will ask you whether it was your practice to suggest to retail druggists that when they received a physician's prescription specifying Coco-Quinine, Lilly, they could, without the physician's consent, or knowledge, fill that prescription with Quin-Coco, S. & H.?

A. Not for one instant did I suggest anything clandestine. If the druggist could induce the physician to permit the said substitution I always suggested that this was right so to do. But there were so many instances where the customer came in and called for Coco-Quinine and the druggist could show him the large bottle S. & H., the color being the same, and he would usually say, "Yes, that is what I want."

X Q. 36. What I am asking you about is whether you, in selling Quin-Coco, suggested such a thing to the druggist? Or suggested that he could do such a thing?

A. I always suggested as above stated in previous answers that in giving the customer Quin-Coco he was not only making a better profit (which was his prime idea in being in the drug business) but also, as above stated, that he was giving the customer a superior article to the one called for, namely Coco-Quinine.

X Q. 37. You have said that "Not for one instant did I suggest anything clandestine" as to filling a prescription specifying Coco-Quinine with Quin-Coco. Now I ask you whether you suggested anything clandestine to the druggist in retailing over the counter Quin-Coco for Coco-Quinine?

A. I certainly do not think so. In fact, I know I did not suggest anything clandestine thereby. When a man buys a better article than the one called for he certainly is none the loser. I once
166 went into a hat store to buy a Knox hat, but there happened to be a salesman in that store and I walked out with some off-brand hat, to use the phrase, but perfectly satisfied.

X Q. 38. Did you, in so many words, tell retail druggists that they could buy Quin-Coco and clandestinely sell it to customers over the counter who called for Coco-Quinine?

A. On the other hand, as above stated, I always suggested to the druggist to show the customer what he was buying, telling him that this preparation would not coagulate. At the same time the customer

called for Coco-Quinine, but if he succeeded in showing him that he had a better preparation whether the customer knew it to be Coco-Quinine or not, that I do not consider clandestine. It is a matter of business, pure and simple and the poor retail druggist needs all the extra cash he can get. As stated several times I have always believed that when a man buys a better article than the one for which he calls he is none the loser.

X Q. 39. Did you tell the druggists that they should tell customers over the counter that Quin-Coco would not coagulate and that it was a better preparation than Coco-Quinine?

A. I always suggested, as above stated, my idea of selling Quin-Coco in the place of Coco-Quinine, but I did not lay down any set rule by which I demanded the druggist should follow.

X Q. 40. What I wanted to ask you is merely as to what you suggested to the retail druggists. Did you suggest to them that they should tell their customers over the counter that your preparation would not coagulate and that it was a better preparation than Coco-Quinine? Was that your suggestion?

By Mr. Bradford: Objected to as the witness has already answered the same question several times.

A. If I have not made the matter clear before this I fail to
167 know how to make anything clearer. I have always suggested to the trade in buying Quin-Coco they were buying it strictly as a "replacer" for Coco-Quinine.

X Q. 41. In answer to X Q. 29 you have specified that by "replacer" you mean a preparation "which in class and quality was similar to the original." Could not a druggist honestly use Quin-Coco as a "replacer" for Coco-Quinine by getting the consent of a physician who has prescribed Coco-Quinine, to use Quin-Coco? And, when a customer over the counter called for Coco-Quinine, explaining to such a customer that Quin-Coco was a better preparation and did not coagulate?

A. That would be a matter left entirely with the druggist. My business was to sell Quin-Coco in the place of Coco-Quinine. How he sold the preparation was entirely optional with him. My own sales to the druggists were open and above board and nothing whatever in the way of a clandestine nature was between us.

As above stated I invariably demonstrated the difference between Quin-Coco and Coco-Quinine, stating as I have time and time again that I believed and still believe that Quin-Coco is a superior preparation to Coco-Quinine. If the druggist obtained the consent of the physician to substitute Quin-Coco when the physician had written Coco-Quinine that would be a matter entirely between the druggist and physician, for by mutual consent the Quin-Coco, as in this instance, could be substituted for Coco-Quinine.

X Q. 42. My questions are intended to bring out, not what the druggist might thereafter do, but what it was that you would suggest to him to do?

You have said in answer to X Q. 41 "My own sales to the druggists

were open and above board and nothing in the way of a clandestine nature was between us."

What I want to know is whether you suggested to the druggist any clandestine method of selling Quin-Coco to customers over the counter. I call your attention to X Q. 33, where you said
168 that your invariable effort was to induce druggists to influence their customers to use Quin-Coco in place of Coco-Quinine.

A. I still state and continue to state and will restate all day, all night, all week, or all the year, that a druggist in inducing a customer to buy what is, to my mind, a superior preparation, is doing the customer a favor, instead of trying to "palm off" an inferior article. I have fully stated that in the sale of Quin-Coco all I could do was to try to induce the druggist to buy same. My suggestion to him was, as above stated several times, that his profit was not only better, but that his repeat sales would prove that my idea in connection with the experience I have had with former customers, would be that the sales would repeat and continue to repeat in future.

X Q. 43. If you will pardon me, I now ask you whether you suggested to retail druggists that they could buy Quin-Coco and handle it and "palm" it off over the counter to customers calling for Coco-Quinine?

A. If you call buying a better preparation and making more profit on said preparation than the one called for I answer that I invariably suggested to the druggist to show the Quin-Coco in place of Coco-Quinine, but at no time, as above stated, did I ever suggest to "palm off" said Quin-Coco instead of the original product known to the trade as Coco-Quinine.

X Q. 44. Will you state what S. Pfeiffer Manufacturing Company was in reference to Pfeiffer Chemical Company?

A. There was no relation whatever either by tie of consanguinity or in a business way. It was an entirely different concern. My connection with the Pfeiffer Chemical Co. covered the period of about twelve years from 1901 to 1912 inclusive.

X Q. 45. When you speak of the consolidation of the Warner Company and the Pfeiffer Company, I suppose you mean nothing more than a consolidation of the business, and you are not referring to any legal corporate consolidation?

169 A. I meant the mutual organization as it was presented to me while I was representing the company that the Pfeiffer Chemical Company bought controlling interest in the William R. Warner and Company.

X Q. 46. And the identity of the two corporations thereafter continued to exist, so far as you know?

By Mr. Bradford: Objected to as incompetent.

A. Every firm the Pfeiffer Chemical Company bought or of which they bought a controlling interest retained its own identity so far as the manufactured product of said concerns were labeled, but the entire supervision during my connection with the firm was under the Pfeiffer Chemical Company officials.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 47. Referring to "replacers," as the term is used in the drug trade, are any other elements than quality essential to make a good replacer?

A. As above stated quality and price, the latter always being lower, is what is meant by the term "replacer."

R. D. Q. 48. Would the color and flavor have anything to do with enabling one product to be sold as a "replacer" for another?

By Mr. Rawle: Objected to as irrelevant.

A. The color and flavor should be as near identical as possible.

ALVA LEE KELTON.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

170 JEROME B. SAND, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Jerome B. Sand; age, 53; Nashville, Tenn.; Pharmacist, President of the Sand & Sumpter Drug Company, Retail Druggists.

Q. 2. Please state comparatively the character and extent of your business?

A. It is just a general drug business, about $35,000 a year.

Q. 3. Do you do a large prescription business?

A. We are just about the average of what the up-town drug stores do.

Q. 4. Do you handle a pharmaceutical product known as Coco-Quinine?

A. We do.

Q. 5. How do you dispense it?

A. Principally on prescriptions. Sometimes on call from the laity.

Q. 6. How are the prescriptions written that come into your store for this product?

A. Either Coco-Quinine or Coco-Quinine, Lilly.

Q. 7. How is it asked for by customers over the counter?

A. Almost invariably for Coco-Quinine.

Q. 8. How long have you been handling this product?

A. Not less than ten years, probably more. We have been handling it ever since they have been putting it on the market.

Q. 9. Whose product do you recognize Coco-Quinine to be?

A. Eli Lilly & Co.

171 Q. 10. Have you ever received a prescription calling for Quin-Coco?

A. Not to my knowledge.

Q. 11. Have you ever received a call over the counter for Quin-Coco?

A. I have not.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. How many clerks do you employ?

A. At present I have two prescription men besides myself. In addition I have a prescription man who works at night.

I have two stores, one in this hotel and the other at Union Street and Fifth Avenue. At the latter I work with one prescription man. There is one prescription man at the Hotel store. We do very little prescription business at the hotel, not more than a fifth of what we do at the other store.

Redirect examination.

By Mr. Bradford:

R. D. Q. 13. If a prescription or an order for Quin-Coco came to your store would you probably have it called to your attention?

A. I would.

Recross-examination.

By Mr. Rawle:

R. X Q. 14. And what would you fill it with?

A. Quin-Coco if I could obtain it in the city.

R. X Q. 15. And if not.

A. I would not fill it at all.

R. X Q. 16. Would you consider it dishonest to fill it with anything else?

172 A. I most certainly would. In fact I don't know what Quin-Coco is. I never saw it in my life. I may have heard of it, but it is an article I am not at all familiar with.

JEROME B. SAND.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

CHARLES L. KOELLEIN, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Charles L. Koellein; age, 31; Nashville, Tenn.; Drug Clerk, Wholesale. I have charge of the Order Department for Berry De Movile & Co., Wholesale Druggists.
Q. 2. What territory does your house cover?
A. We cover part of Kentucky, most of Tennessee, and Northern Alabama.
Q. 3. Do you handle a pharmaceutical product known as Coco-Quinine, and if so, whose product is it?
A. We do. It is Eli Lilly's.
Q. 4. Do you have knowledge of the orders that come into your store for pharmaceuticals from the retail drug trade throughout the territory named?
A. I do.
Q. 5. How long have you been in this position?
A. About nine years.
Q. 6. Have you handled Coco-Quinine during all of this
173 time?
A. Yes.
Q. 7. During this period has your store ever received an order for a product called Quin-Coco?
A. Not that I remember.
Q. 8. Would such an order be called to your attention if it had been received?
A. It would have.
Q. 9. Do you receive a good many orders for Coco-Quinine?
A. We do.
Q. 10. And have during all these years?
A. Yes, sir.

Direct-examination closed.

No Cross-examination.

CHAS. L. KOELLEIN.

Subscribed and sworn to before me this 29th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Gus A. Blodau, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Gus A. Blodau; age, 45; Nashville, Tenn.; Druggist, I am in the Drug business for myself.
Q. 2. Do you handle at your store a pharmaceutical product known as Coco-Quinine, and if so, what can you tell us about it?

A. Well, I have handled Coco-Quinine for a number of years, and Lilly's product is the one I have always used.

174 Q. 4. Do you know of any other product by this name, Coco-Quinine?

A. I understand Warner & Company put up a preparation known as Quin-Coco. It was a chocolate preparation of quinine supposed to be in tasteless form and the representative asked me if I was using Coco-Quinine. I stated "Yes." And he recommended to me this preparation which he said I could buy at a much less figure, in fact, a gallon would cost me about the same price as a five pint bottle of Lilly's preparation of Coco-Quinine. I told him that irrespective of the fact whether it was the identical formulæ or not and would answer in its place that I had been working for one man John G. Greener, for twelve years and he had always been very bitterly opposed to the substitution of any preparation.

I am not positive what he said that follows. I am however under the impression that he said that the Quin-Coco, or whatever it was he was selling in place of the Coco-Quinine, was on the market before the Coco-Quinine was.

I told him further that Mr. Maddan, the representative of Eli Lilly & Co., lived in my neighborhood and I bought considerable Coco-Quinine from him and could not accept any substitute for his preparation, or anything he was selling as a substitute.

Q. 5. In your last answer you say "I told him that irrespective of the fact whether it was the identical formulæ or not and would answer in its place." Will you kindly explain more fully what you mean by this language?

By Mr. Rawle: The question is objected to as improper and because the only proper question to ask the witness is as to what was said and not the witness's understanding of what was said.

A. He gave me to understand that by the use of this preparation it would be a saving of money for me and why pay the price I did for Coco-Quinine. Naturally the impression to be made on

175 me was that I should use his preparation in place of Coco-Quinine.

By Mr. Rawle: I object to the answer, so far as he states the salesman gave him to understand so and so, and so far as he states that the impression made upon his mind was so and so, and because the witness has not testified or been asked to testify as to what was said.

Q. 6. Did the representative of William R. Warner and Company say anything in reference to the formulae and if he did, what?

A. He didn't give me the formulae but he wanted to show the sample to me which I didn't care to see as I had already stated I would not buy, and he further told me that they had a man that formerly worked with Lilly & Company, and he had sold to a number of druggists this preparation, and they were using it right along for chocolatae quinine and like preparations.

By Mr. Rawle: Objected to as hearsay and irrelevant.

Q. 7. Did the Warner representative say anything in reference to the comparative virtues of the two preparations Coco-Quinine and Quin-Coco? And if he did, what did he say?

A. I can't recall anything further than I have just recorded, except that the Coco-Quinine and his preparation were about identical, but owing to the fact that I gave no encouragement in regard to purchasing same, the matter was virtually dropped.

Q. 8. Did you know of any other Coco-Quinine or chocolate quinine preparation on the market prior to the time the Eli Lilly & Company's Coco-Quinine was brought to your attention?

A. I did not. I have been in business 25 years at least, that is, either as clerk or proprietor.

Q. 9. How is Coco-Quinine dispensed in your store? On call over the counter or on prescriptions or both?

176 A. Both.

Q. 10. Have you ever had a prescription for Quin-Coco?

A. I have not.

Q. 11. Have you ever had a customer call for Quin-Coco?

A. No.

Q. 12. What was the name of William R. Warner & Company's representative who called on you?

A. Mr. Devall, I think his name is.

Q. 13. Do you buy other items of the Warner line from him?

A. I do.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. Do you mean by "substitute" an article which is like another article and can be used in place of it?

A. Substitution covers quite a broad field. In this case I speak of it in the use of one preparation to take the place of another preparation made by a different firm under a different name although they may claim to be identical.

I mean, that is, in case a preparation of a certain make is called for, either on prescription or over the counter, and another preparation supposed to be identical in formulæ of a different manufacture than called for is dispensed is substitution. This substitution is allowable or is really not substitution when agreeable to both parties and known to both parties that the exchange has been made.

X Q. 15. By both parties you mean the druggist and the physician or the druggist and the customer, do you?

A. If it is a direct call from a customer then the agreement to substitute one for the other must be between them. How-

177 ever, on a prescription the exchange of one for the other must be made with the writer and the dispenser.

X Q. 16. And that is the only way you would make a substitution?

A. That is not a substitution. It is a legitimate agreement whereby one party agrees to eliminate one preparation and use another. The purchaser if called over the counter or the physician if written on a prescription are the only ones who have the right to give me permission to make this change. Therefore if the call is for another article it is not a substitution, where the exchange is made in this way.

X Q. 17. In your opinion would a perfectly honest druggist use one article for another called for, without the consent of the physician who wrote the prescription or the customer who was buying over the counter?

A. A perfectly honest druggist who would use one article for another called for without the consent of the physician who wrote the prescription or the customer who was buying over the counter would cease to be an honest druggist.

X Q. 18. Did the salesman suggest to you that when Coco-Quinine was specified in the prescription or called for over the counter, you should dispense Quin-Coco dishonestly in either case, in place of Coco-Quinine.

A. He did not state that I should use Quin-Coco dishonestly either on prescriptions or over the counter but that I could use the same.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 19. Did Warner's representative claim that the Warner preparation is identical with the Lilly preparation, and if he did, what reasons did he give for such a claim?

By Mr. Rawle: Objected to as repetition.

178 A. I can't say that he stated it was the identical same product but he gave me to understand it was a good substitute for Coco-Quinine at quite a saving of price.

By Mr. Rawle: Objected to because the witness states what the salesman gave him to understand and not what the salesman said.

R. D. Q. 20. Did he say anything about who compounded their preparation for them?

A. He did not say who compounded the preparation but stated that they had a man that was formerly with Eli Lilly & Company. This is to the best of my knowledge that I can remember of now.

Redirect-examination closed.

GUS A. BLODAU.

Subscribed and sworn to before me this 29th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Tuesday, March 30th, 1915, at 10 a. m., at Hotel Peabody, Memphis, Tenn.

Memphis, Tenn.,
Peabody Hotel, March 30th, 1915—10 a. m.

Met pursuant to adjournment, at the Peabody Hotel, Memphis, Tenn.

Parties present as before.

CARL O. MANNING, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

179 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Carl O. Manning; age, 32; Memphis, Tenn.; Druggist, my Pharmacy is located at 825 Thomas Street, Memphis, Tenn. I am the Proprietor. I have been a registered Pharmacist for about six years.

Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine at your store, and if so, whose product do you recognize this to be?

A. Yes, sir. It is Eli Lilly & Company's product.

Q. 3. How do you dispense this product?

A. We dispense it on prescriptions and on call from the customer over the counter, in our own bottles under our own labels.

Q. 4. Do you ever receive prescriptions calling for Quin-Coco?

A. No, sir.

Q. 5. Do you ever receive calls from customers over the counter for Quin-Coco?

A. No, sir.

Q. 6. Have you ever heard of Quin-Coco, and if so, will you please relate the circumstances?

A. Yes, sir. It was introduced at that time by the Pfeiffer Chemical Company, their representative, as a chocolate quinine identical with the product of Lilly.

Q. 7. What did the representative say to you in reference to this product?

By Mr. Rawle: I object to the question as relating to the Pfeiffer Chemical Company and, therefore, not calling for testimony which could affect the defendant's rights.

A. That it was the same product as Coco-Quinine.

Q. 8. Is that all?

A. Yes, sir.

Q. 9. Did he say anything to you about the price?

By Mr. Rawle: Objected to as the question has been already
180 answered by the witness in his statement that "That is all" and as leading.

A. Yes, sir.
Q. 10. What did he say about the price?

(Same objection.)

A. That it was much cheaper than Coco-Quinine. That it was $3.25 a gallon in five gallon quantities.
Q. 11. How are prescriptions for Coco-Quinine written by physicians, as received at your store?
A. As Coco-Quinine.
Q. 12. How do customers call for it over the counter?
A. The majority call for Coco-Quinine, and occasionally for chocolate quinine.
Q. 13. When a customer calls for chocolate quinine, what product do you understand is intended?
A. Coco-Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. That is because you do not carry Quin-Coco, Warner, is it not?
A. Before the Quin-Coco came out we had no other chocolate quinine.
X Q. 15. Do you now handle both?
A. Not just at present, I have.

Cross-examination closed.

CARL O. MANNING.

Subscribed and sworn to before me this 30th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

181 JOHN R. TAGUE, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. John R. Tague; age, 55; Memphis, Tenn.; Druggist, employed by the Van Vleet Mansfield Drug Company, as Manager. It is a wholesale house.
Q. 2. What territory does this house cover in its trade?
A. Well, we travel within a radius of two hundred and fifty or three hundred miles.

Q. 3. Do you handle a product known as Coco-Quinine?
A. Yes, sir.
Q. 4. How long have you handled this product?
A. I should say some fourteen or fifteen years.
Q. 5. Do you have a considerable demand for it from the trade?
A. Yes, sir.
Q. 6. Is the demand continuous and constant?
A. Yes, sir.
Q. 7. Do you know anything of a product called Quin-Coco, and if so, what?
A. Yes, we stocked Quin-Coco some four or five years ago, at the solicitation of one of their salesmen. At that time they were making a push on the preparation and desired that we might have the stock with which to fill the orders that the salesmen might turn to us. At that time we sold a few packages in that way, but after this particular salesman left their employ I don't recall having sold any of the goods.
Our present stock of these goods was gotten some two or three years ago. Recently a couple of bottles were sold or disposed 182 of in some way as their absence was indicated by the dust marks on the shelves.

By Mr. Rawle: Objected to as irrelevant and immaterial, as volunteered and hearsay.

Q. 8. Did you inspect your stock of Quin-Coco before coming here to testify? And if you did is your last answer based upon what you saw on such inspection?

By Mr. Rawle: Objected to as immaterial.

A. I looked at the stock from the floor below, it being on a gallery above, and it seemed to be in the shape that it has been for quite a long while.
Q. 9. You spoke of their salesman. Whose salesman do you mean?
A. The salesman of the concern that was marketing the product. I feel sure that it was William R. Warner & Co.
Q. 10. You also stated that at that time you sold a few packages "in that way." Won't you explain more fully what you mean by the words "in that way?"

By Mr. Rawle: Objected to as irrelevant.

A. Through the efforts of their salesman.
Q. 11. Whose product do you recognize Coco-Quinine to be?
A. That of Eli Lilly & Co.
Q. 12. Did you ever know of any other chocolate quinine preparation prior to the time Coco-Quinine was offered to the trade by Eli Lilly & Co.?
A. No, sir.

Direct-examination closed.

No Cross-examination.

J. R. TAGUE.

Subscribed and sworn to before me this 30th day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

183 ROBERT L. WINCHESTER, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert L. Winchester; age, 49; Memphis, Tenn.; Salesman, representing the Eli Lilly & Co., of Indianapolis, Indiana.

Q. 2. How long have you been representing Eli Lilly & Co. in this territory?

A. Four and three-quarter years.

Q. 3. What territory do you cover?

A. West Tennessee.

Q. 4. What are your duties?

A. To sell Lilly's goods to the retail trade through the wholesale trade; to detail physicians and the usual duties of a traveling salesman of a pharmaceutical house. I sell Lilly's goods to the retail trade through the wholesale trade.

Q. 5. Will you explain what you mean by the term "detail" referring to detailing physicians?

A. To call upon physicians for the purpose of giving them samples of the various products manufactured by Lilly, explaining the purposes for which such products should be prescribed and to create a demand for Lilly's goods in this manner by prescriptions written by the physicians.

Q. 6. What can you tell us, if anything, relative to the Lilly product known as Coco-Quinine?

A. Lilly's Coco-Quinine is offered by me as a palatable preparation for the administration of sulphate of quinine. I call attention to its being able to be administered to children especially, by this means. I explain to the physician that this product was devised by Eli Lilly & Co. and that each average teaspoonful contains

184 two grains of quinine sulphate, in a palatable menstrum.

Q. 7. How long have you had knowledge of this Coco-Quinine?

A. For a number of years before I went to work for Eli Lilly & Co. I knew of the fact that Eli Lilly & Co. manufactured it.

Q. 8. What was your employment before you went to work for Eli Lilly & Co.?

A. I was manager of the St. Louis branch of Sharpe & Doehme of Baltimore, Md., before I went to work for Eli Lilly & Co.

Q. 9. What can you say of Lilly's Coco-Quinine in respect to it being a preparation original with that house?

By Mr. Rawle: Objected to as the witness has not qualified as to his knowledge on that subject.

A. I knew for years before I went to work for Eli Lilly & Co. that they were the first to produce such a combination of quinine with chocolate and while in Sharpe & Doehme's employ, I suggested to them that they should get out a preparation along similar lines, but Sharpe & Doehme refused to consider the matter.

Q. 10. Do you know anything of a product called Quin-Coco, and if so, what can you state in reference thereto?

A. Quin-Coco is a preparation that has been offered for sale in the territory that I cover in West Tennessee for Eli Lilly & Co. as the same thing as Coco-Quinine. Numerous retail druggists have told me that it was offered to them as such by representatives of the Pfeiffer Chemical Company, of St. Louis, now known as William R. Warner & Co., I believe.

By Mr. Rawle: The answer is objected to as hearsay, and because statements as to the Pfeiffer Chemical Company do not affect the rights of the defendant.

185 Q. 11. Have you ever seen this product so called Quin-Coco in the stores of retail druggists in your territory?

A. Yes, I have found it in the stocks of the Majority of the retail drug stores.

Q. 12. In appearance is it the same as Coco-Quinine?

A. Very much so.

Q. 13. In taste or flavor is it the same as Coco-Quinine?

A. I never tasted it. I have been told so.

By Mr. Rawle: The last sentence is objected to as hearsay.

Direct-examination closed.

No Cross-examination.

ROBERT L. WINCHESTER.

Subscribed and sworn to before me this 30th day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

Recess until 3 o'clock p. m.

After Recess.

March 30, 1915—3 o'clock p. m.

WILLIAM M. SCOTT, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

186 A. William M. Scott; age, 37; Memphis, Tenn.; Pharmacy. Up to the first of this year I was the proprietor of the drug store located at 902 Chelsea Avenue, and since then

I have been doing relief work, at Lavison's Pharmacy, at McLemore & Patton Sts., and am now permanently located at 333 Poplar St., J. G. Duncan's Drug Store.

Q. 2. Are you familiar with a pharmaceutical product known as Coco-Quinine, and if so, what can you tell us about it?

A. My first knowledge of it was at Brownsville, Tenn., where I was located in the retail drug business. It was detailed to physicians by the representative of Eli Lilly & Company. That was some fifteen or sixteen years ago. Their representative called on me and the labels showed it to be Coco-Quinine, Lilly, two grains of sulphate of quinine to each teaspoonful of syrup. I was manager for the E. D. Davis Pharmacy in Greenville, Miss., for one year and dispensed and sold Coco-Quinine, Lilly. After that I came to 902 Chelsea, in the retail drug business for myself, in Memphis. Mr. Devall, representing William R. Warner and Company, called on me either in last September or October and stated that Quin-Coco could be dispensed and sold as Coco-Quinine, Lilly's. On December the 24th, 1914, at that time, I was manager of Lavison's Pharmacy, McLemore & Patton Sts., Memphis, Mr. Devall called on me and stated that I could put up and dispense Quin-Coco on specified prescriptions for Lilly's Coco-Quinine.

Q. 3. When did you first hear of this product you have referred to as Quin-Coco?

A. In 1912 or '13.

Q. 4. And when was it next introduced to you?

A. Why nearly every time one of their representatives came to me, I couldn't say when.

Q. 5. What arguments were used by the representative of William R. Warner & Co. in soliciting your order for Quin-Coco?

187 A. To use their words "It was the same thing as Coco-Quinine, Lilly's as sold by Mr. Winchester."

Q. 6. How about the price, was anything said about that?

A. They made the remark that it was much cheaper.

Q. 7. How do you dispense Lilly's Coco-Quinine?

A. On doctor's prescriptions and we put it up in one ounce, two and three different size bottles to sell over the counter, calls for it.

Q. 8. Have you ever seen a prescription written by a physician, calling for Quin-Coco?

A. Not to my knowledge.

Q. 9. Have you ever had a customer call for Quin-Coco over the counter?

A. No, sir.

Q. 10. As I understand it, you have been selling and dispensing Coco-Quinine at various places and stores for the past fifteen years or so. Is this correct?

A. Yes, sir.

Q. 11. Did you ever know of any other similar pharmaceutical preparation before Eli Lilly & Co. introduced Coco-Quinine to the trade?

A. I did not, I never did.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. Mr. Scott, at the time or times that Du Vall called on you, were you employed in a drug store or were you the owner of the drug store?

A. I was the owner of the drug store twice, the last time he called on me I was not, I was manager. The last time was December 24th, 1914.

X Q. 13. How do you fix the date?

A. I went to work and took charge as manager on the 24th of December and Mr. Du Vall happened to be in the store and
188 made the statement to me, and that is why I remember the date.

X Q. 14. Was anybody present and hearing the conversation?

A. Not that I recall.

X Q. 15. Are you in doubt about somebody being present?

A. Yes, sir.

X Q. 16. You don't remember whether anybody was present or not?

A. No, sir.

X Q. 17. Are you now speaking of the third interview?

A. Yes, sir, and last.

X Q. 18. Was anybody present during the conversation, at the first interview?

A. No, not that I know of. I couldn't be positive.

X Q. 19. Was anybody present during the conversation at the second interview?

A. No, sir, not that I know of.

X Q. 20. Do you mean by that that you do not distinctly remember about any one being present at the second interview?

A. Yes.

X Q. 21. Did Mr. Du Vall, at the first interview try to sell you any other preparations or pharmaceuticals?

A. He did.

X Q. 22. Did that store at that time handle any of Warner's products?

A. They did.

X Q. 23. To a considerable extent?

A. For that sized store.

X Q. 14. On Du Vall's first call did you buy any of his products?

A. No, sir, not on his first call. At that time I was in business for myself, located at 902 Chelsea Ave., Memphis, and had just gone into business at that place.

X Q. 15. How long did his call last the first time?

189 A. I guess he was in there perhaps three-quarters of an hour. I don't remember. I couldn't say. He stood around and talked socially.

X Q. 16. Do you remember about how many Warner products approximately he talked to you of at the first interview?

A. His specialties of course and the first one he mentioned was the Quin-Coco and his statement was to be that it could be sold and dispensed on physicians' prescriptions specifying Lilly's Coco-Quinine and he added that it was a much better profit.

X Q. 17. Would a perfectly honest druggist receiving a prescription which specified Coco-Quinine, fill it without the consent of the physician by using Quin-Coco?

A. He would not.

X Q. 18. In your opinion such act would not be honest?

A. It would not be ethical or honest.

X Q. 19. And I need hardly ask whether or not you would do such a thing?

A. I would not, most positively.

X Q. 20. Likewise, if a perfectly honest druggist had a customer who was asking for Coco-Quinine would he dispense Quin-Coco and still in your opinion be considered honest?

A. He would not.

X Q. 21. And that I take it is a thing which you would not do?

A. I would not. He would be a substituter, in my opinion.

X Q. 22. If a prescription called for Coco-Quinine and you had none in stock but you had Quin-Coco in stock, would you if possible reach the physician and ask leave to use the Quin-Coco in place of the Coco-Quinine?

By Mr. Bradford: Question objected to as immaterial to any issue in this case.

190 A. I would.

X Q. 23. And if a customer came in and called for Coco-Quinine and you had none, but you had Quin-Coco, what would you do?

A. I would explain to them, to the customer, that I did not have the Coco-Quinine, Lilly's, that I had a substitute known as Quin-Coco, represented to me as a chocolate or cocoa quinine.

X Q. 24. And you would offer to sell them the Quin-Coco in place of the thing called for?

A. I would suggest it to the customer.

X Q. 25. Will you please state in the exact words of Mr. Du Vall at the first interview, what he said to you, using what is called in grammar, the direct form of narration? And also state what you said to him during the conversation which took place about Quin-Coco and Coco-Quinine?

A. Why he first came in to me at 902 Chelsea Ave., spoke to me in a friendly way, and asked me if I would not give him some business and made the statement that he was glad to see me in business for myself and believed that was a good stand and wanted to sell me a line of Warner's preparations, non-secrets, &c., and remarked "Scott, you know we have the Quin-Coco which is the same as Lilly's Coco-Quinine, sold to you by Winchester; shall I show you the preparation or have you ever seen it? You can use it on specified prescriptions for Lilly's Coco-Quinine. I have the old reliable line of non-secrets. Will come out to see you in a very short time. Mak

me out an order and I will give you satisfactory terms. Hoping you will do well." That is all the conversation that I recall.

X Q. 26. You have testified that it is dishonest and unethical for a druggist when receiving a prescription which specifies Coco-Quinine, to fill it without the consent of the physician by using Quin-Coco. It appears to me from your answer that Mr. Du Vall, if your memory is correct, was proposing to you, as a druggist, 191 that you should do or commit this dishonest and unethical act. Is that not so?

A. If I may be allowed to express this, I don't think Mr. Du Vall intended that reflection upon me as according to Mr. Du Vall's statement so many were using and substituting this so called Quin-Coco, and my opinion was that Mr. Du Vall wanted to let me in on a close substitute. That is the way I felt about Mr. Du Vall's suggestion to me in regard to Quin-Coco. I feel sure that Mr. Du Vall never had any reason to reflect upon me, and would not have done so.

X Q. 27. But have you not testified that he suggested to you that you should use Quin-Coco in prescriptions calling for Coco-Quinine?

A. He did not suggest that I should use them. He said it could be done, and was being done.

X Q. 28. Didn't he mean that you could do it?

A. I didn't take it that way. I took it that it could be done if I was disposed to do so, that is the impression the interview had on me.

X Q. 29. Then if any one wished to bribe a member of the legislature you think he would say to him "If you are disposed to take a bribe I will give you one." Would you consider that an attempt to bribe?

By Mr. Bradford: Objected to as immaterial.

A. I don't know anything about that sort of thing at all. I am not familiar enough with it to answer it.

X Q. 30. Haven't you said that Du Vall suggested to you that you could use his Quin-Coco in prescriptions calling for Coco-Quinine?

A. No, sir, not me. That it could be used. He did not specify me.

X Q. 31. Wasn't he talking to you at the time?

A. Yes, sir, he was leaving me under the impression that it could be done and was being done by others.

X Q. 32. But what I don't understand is this: Wasn't he trying to sell you Quin-Coco and giving you as a reason for buying 192 Quin-Coco that you could use it in place of Coco-Quinine in prescriptions?

A. That it was being used and offering me the opportunity to buy it and use it if I so desired.

X Q. 33. Wasn't that the same thing as his suggesting to you that you should be dishonest if you so desired?

A. I didn't take it that way or feel so about it at the time Mr. Du Vall mentioned same to me. I looked upon it as a matter of

gossip or suggestion, not any reflection whatever upon me, personally.

X Q. 34. But wasn't he suggesting to you that you do a dishonest thing?

A. He was not, and I did not feel that he was.

X Q. 35. If that be so, may not Du Vall believing you to be an honest druggist, have meant or said to you in effect that you could, by getting the physician's consent, use Quin-Coco when a prescription called for Coco-Quinine and in this way honestly dispense Quin-Coco?

A. Mr. Du Vall never stated his opinion of my honesty or being ethical. As I have stated Mr. Du Vall only spoke of Quin-Coco being used in place of Coco-Quinine, Lilly's being used.

X Q. 36. It seems to me that he either made an immoral suggestion to you or that he didn't, which was it?

A. It didn't impress me as being an immoral suggestion, and I feel sure that Mr. Du Vall would not have any cause to offend me in any way. I considered his suggestion in regards to Quin-Coco being substituted for Lilly's Coco-Quinine as a matter of gossip and more so than suggestion, no reflection upon my being ethical or my honesty as a pharmacist or man.

X Q. 37. How could an honest druggist, as you are, handle and dispense both Coco-Quinine and Quin-Coco?

By Mr. Bradford: Objected to as wholly immaterial and as having been fully answered.

193 A. My explanation is that I never, when I was in the retail drug business for myself, handled but one preparation of Coco-Quinine, that being Lilly's. When I was employed by other houses that had this Quin-Coco in stock I used same upon consent of physicians only. I have called the attention of several physicians to this Quin-Coco asking them to prescribe same to enable me to dispose of it so I could buy the original Lilly's Coco-Quinine to use on their prescriptions.

X Q. 38. Then, on the whole, you believe that Du Vall by what he said to you at the first interview, had no intention of impugning your honesty or of suggesting to you that you do a dishonest act?

A. The impression his interview had on me was that he had no reflection upon my being an honest or ethical pharmacist.

X Q. 39. Is it not possible that he said or gave you to understand that in using Quin-Coco in prescriptions in place of Coco-Quinine you should first obtain the doctor's consent?

By Mr. Bradford: Objected to as having been previously fully and completely answered many times.

A. I have answered the above question to the best of my ability.

X Q. 40. Question is repeated.

By Mr. Bradford: I object further to the unnecessary repetition of this question when the witness has already answered and has

shown no disposition to evade any question at any time and the question therefore being apparently without purpose.

By Mr. Rawle: The objection is objected to.

Mr. Rawle requests the Examiner to instruct the witness that Mr. Rawle is entitled to an answer to his question without regard to whether it has been answered before.

194 The Examiner: In reply the Examiner states that as he understands the practice and his duties he cannot instruct the witness but that the witness can answer the question in his own way.

A. I have answered this question to the best of my ability heretofore.

X Q. 41. I repeat the question and ask you if you decline to answer?

A. I do not.

X Q. 42. Will you please answer the question numbered X Q. 39?

A. Why to the best of my knowledge and belief he did not mention the doctor's consent, the physician was not mentioned, only in the way that it could be used on specified prescriptions.

X Q. 43. Used by you on specified prescriptions?

A. No, he left me under the impression that it was being used and could be used. He did not say that I could.

X Q. 44. Why do you think he wasted your time by telling you that it could be so used unless he meant to convey the impression that you could so use it?

By Mr. Bradford: Objected to because the witness has said on several occasions, both in direct and cross-examination, that Mr. Du Vall did say that it could be so used.

A. As I have stated before my opinion is that it was in the way of gossip more than suggestion, no reflection whatever upon my honesty or as an ethical pharmacist.

X Q. 45. Will you please give in the direct form the conversation with respect to your buying Quin-Coco, which took place between you and Du Vall at the second interview?

A. I did not buy any Quin-Coco from Mr. Du Vall.

X Q. 46. Have you not testified that there was a second interview with Du Vall, at which he tried to sell you Quin-Coco?

195 A. Yes, sir, there was.

X Q. 47. Will you please state in direct form the words of Du Vall and yourself at the second interview on this subject?

A. Why Mr. Du Vall called on me at the second interview. I was then manager of Lavason's pharmacy, McLemore & Patton Sts. Mr. Du Vall—I don't recall the exact conversation that took place previous to his mentioning the Coco-Quinine proposition. Then Mr. Du Vall said to me that this Quin-Coco of theirs was being used and substituted, to use his words, for Lilly's Coco-Quinine sold by Mr. Winchester.

I can't recall much of that conversation at the last part of this answer.

X Q. 48. Can't you give the words he used with reference to his efforts to sell you Quin-Coco?

A. Yes, he left the impression upon me that it was being used and substituted for Lilly's Coco-Quinine.

X Q. 49. What words did he use in creating this impression?

A. Well, he says "It's being used in the majority of the drug stores as you are aware of use it and the majority of them in my territory use it." He also called my attention to various and sundry druggists over the State and in his territory, that were using and buying from him in large quantities.

X Q. 50. Did he give you the impression that by this statement he intended to impugn the honesty of druggists in his territory who were buying Quin-Coco? And did he give you the impression that all those who bought Quin-Coco from him would use it dishonestly?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant.

A. It did not impress me that way and I feel sure that he did not mean to leave me under that impression.

X Q. 51. I now call your attention to the third interview in which Du Vall endeavored to sell you Quin-Coco. Did he at this
196 interview give you the impression that he intended to impugn the honesty of druggists in his territory who were buying Quin-Coco and did he give you the impression that all those who bought Quin-Coco from him would use it dishonestly? Do you make the same answer to this question that you did to the last question?

A. I do.

X Q. 52. The Examiner will read you X Q. 23. Please state if by "substitute" in your answer to that question you mean an honest substitute or substitution?

A. If I understand it right a substitution is not honest, if I understand the meaning of the word "substitution."

X Q. 53. I call your attention again to X Q. 23 and ask you if you did not in your answer refer to a perfectly honest action? Namely, one in which you explained to the customer that you did not have Coco-Quinine, Lilly, but had Quin-Coco. That would be honest business, wouldn't it?

A. Yes, sir. That would be my mode or form of suggesting a substitute to the customer, not to recommend same.

X Q. 54. And you are now using the word "substitute" in connection with an honest transaction? Please answer yes or no?

A. Yes.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 55. In what sense do you use the word "honest" and "dishonest" in this cross-examination?

A. To give a man a substitute for what is specified on prescription.

R. D. Q. 56. You evidently do not catch the meaning of my question. Would a man who was guilty of this practice, I mean
197 substitution, necessarily be a dishonest man in the common acceptation of that term?

A. I do not mean that he would be a dishonest man but not an ethical pharmacist.

R. D. Q. 57. Are you acquainted with the jobbing house of Van Vleet-Mansfield Drug Co. If so can you tell us their comparative standing in the trade?

A. It is said to be the second largest wholesale drug store in the South.

I have been informed two years ago they were the largest quinine buyers in the world.

Recross-examination.

By Mr. Rawle:

R. X Q. 58. Do you know whether malarial diseases have of late years decreased in the Southwest and in parts adjacent to Memphis?

By Mr. Bradford: Objected to as not re-cross-examination.

A. I have been informed they have decreased.

R. X Q. 59. And has not this lessened the demand for quinine?

(Same objection, and for the further reason that it is not material to any issue in this case.)

A. It has.

WM. M. SCOTT.

Subscribed and sworn to before me this 30th day of March, 1915.

CHARLES E. RIORDON.
Special Examiner.

Adjourned to meet tomorrow, Wednesday, March 31, 1915, at 10 a. m., at the Marion Hotel, Little Rock, Arkansas.

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Little Rock, Ark.,
Marion Hotel, March 31st, 1915—10 a. m.

Met pursuant to adjournment, at the Marion Hotel, Little Rock, Arkansas, Wednesday, March 31st, 1915.

Parties present as before.

JOHN R. BOND, JR., a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John B. Bond, Jr.; age, 46; Little Rock, Ark.; Wholesale Druggist. My store is located at 113 East Markham St.

Q. 2. What territory does your store serve?

A. Arkansas and Southeast Oklahoma.

Q. 3. Do you sell a general line of pharmaceuticals to the retail trade?

A. Yes, sir.

Q. 4. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, what can you tell us about it?

A. Yes. We handle Coco-Quinine and have ever since it was first marketed and it is one of the most popular preparations on the market. It is here to stay. We cannot do business without it, any more than we could postage stamps. It is a product of the Eli Lilly & Company. Our sales are very large and I would judge it to be a very meritorious preparation from the amount of our sales of it.

Q. 5. How long have you been handling Coco-Quinine?

A. I would judge about fifteen years as long as it has been
199 on the market. I have handled it ever since it has been marketed for about fifteen years. I was formerly in the retail drug business in this city for seventeen years previous to the wholesale business which I have been in for the past five years.

Q. 6. Did you ever have an order while you were in the retail business or since you have been in the wholesale business for a product known as Quin-Coco?

A. Not to my knowledge, no, sir.

Q. 7. Would you be likely to have knowledge of an order for such a product if it was received at your jobbing house or had been received at your retail store?

A. Yes, because everything passes over my desk before same leaves the house, invoices and the like.

Q. 8. While you were in the retail business did you ever receive a physician's prescription calling for Quin-Coco?

A. No, sir.

Q. 9. Did you receive many prescriptions calling for Coco-Quinine?

A. Yes, sir, a good many.

Q. 10. Do you sell a considerable quantity of Lilly's Coco-Quinine, and is the demand a continuous and constant one?

A. Yes, it is continuous and constant, and we sell large quantities of it all over our territory.

Q. 11. When you were in the retail business how did you dispense Coco-Quinine?

A. On doctors' prescriptions and also on calls from customers over the counter, in our own bottles, under our own labels.

Direct-examination closed.

No cross-examination.

JOHN B. BOND, JR.

Subscribed and sworn to before me this 31st day of March, 1915.

CHARLES E. RIORDON,
Special Examiner.

200 CARL BORDEAUX, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and ocupation?

A. Carl Bordeaux; age, 33; Little Rock, Ark.; Druggist. My store is located at Markham and Louisiana St., Little Rock.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, manufactured by Eli Lilly & Co., of Indianapolis, Indiana?

A. I do.

Q. 3. How do you dispense this product in your store?

A. Both by prescriptions and by orders over the counter.

Q. 4. How are the prescriptions written?

A. Usually "Coco-Quinine." Sometimes the manufacturer's name is added.

Q. 5. How do customers call for the product over the counter?

A. Coco-Quinine.

Q. 6. How long have you been handling Coco-Quinine?

A. To the best of my knowledge for about between eight and ten years.

Q. 7. Did you ever know of another similar preparation on the market before Coco-Quinine was introduced by Eli Lilly & Co.?

A. Well, your question is not specific enough. I speak in this regard: There was no other cocoa syrup, there had been syrup of quinine on sale, Febreline, for instance.

Q. 8. Do you know of any product called Quin-Coco, and if so, what do you know about it?

201 A. Well, I have never seen the product, no, sir.

Q. 9. Have you heard of it?

A. Indirectly, yes, sir.

Q. 10. Has it ever been offered to you?

A. No, sir.

Q. 11. Have you ever received a prescription at your store, for Quin-Coco?

A. No, sir.

Direct-examination closed.

No cross-examination.

CARL BORDEAUX.

Subscribed and sworn to before me this 31st day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

SAMUEL V. BRACY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Samuel V. Bracy; age, 43; Little Rock, Ark.; Druggist, member of the firm of Snodgrass & Bracy, Retail Druggists.

Q. 2. Does your store handle a pharmaceutical product known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose product do you recognize this to be?

A. Eli Lilly & Co.

Q. 4. How long have you handled this product?

A. Since it was first put on the market in Little Rock, since it was first *detailed* in Little Rock. About sixteen or eighteen years
202 ago.

Q. 5. Is the demand for Coco-Quinine at your store of considerable proportions and is it continuous and constant?

A. Yes, we consider it a staple article and always keep it in stock in good supply and sell a good deal of it.

Q. 6. How do you dispense it?

A. We dispense it on doctors' prescriptions and also keep twenty-five and fifty cent bottles put in labels and supplied to consumers as called for. We put it up in our own bottles and typewrite the labels.

Q. 7. Does your store do a large prescription business?

A. Well, we do an average prescription business for a retail drug store, from forty to seventy-five a day.

Q. 8. Have you ever had a prescription received at your store calling for Quin-Coco?

A. I do not remember having seen one written that way.

Q. 9. Have you ever had a call over the counter for Quin-Coco?

A. No, sir, I have not.

Q. 10. Would you be likely to know if your store had received a prescription for Quin-Coco?

A. Yes, I believe I would have remembered it if we had calls for Quin-Coco.

Q. 11. Have you made any inquiry or investigation of others in the store to determine this fact?

By Mr. Rawle: Objected to as hearsay.

A. Yes, on request of the present gentlemen, I did, I asked two of the druggists. Neither remembered having had a prescription for Quin-Coco.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. How many clerks have you in your employ?
A. We have one night prescription clerk, three day pre-
203 scription clerks and myself and partner fill prescriptions when necessary.

Cross-examination closed. SAM V. BRACY.

Subscribed and sworn to before me this 31st day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Recess until 2.30 this afternoon.

After Recess.

2.30 o'clock p. m.

STEPHEN D. KNOX, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

Q. 1. Please state your name, age, residence and occupation?
A. Stephen D. Knox; age, 47; Little Rock, Ark.; Druggist. I am the Proprietor of Knox' Drug Store, at 209 West Second St., Little Rock.
Q. 3. Do you handle a product known in the trade as Coco-Quinine?
A. Yes, sir.
Q. 4. Whose product do you recognize this to be?
A. The Eli Lilly Company's.
Q. 5. How long have you handled Coco-Quinine?
A. I would say ten years.
Q. 6. Do you know of any chocolate or cocoa quinine preparation on the market prior to the time this product was introduced by Eli Lilly & Co.?
A. I did not.
Q. 7. How do you dispense Coco-Quinine in your store?
A. On physician's prescriptions in my own prescription bottles, under my own labels.
204 Q. 8. Do you know of a product called Quin-Coco, and if so, what can you tell us about it?
A. I do. I have bought it on the representations that it was about the same and as good as Coco-Quinine.
Q. 9. Who did you buy it of?
A. The representative of Pfeiffer Chemical Company and the William R. Warner Company, of St. Louis and Philadelphia.

Direct-examination closed.

No cross-examination. STEPHEN D. KNOX.

Subscribed and sworn to before me this 31st day of March, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned until tomorroy, Thursday, April 1, 1915, at 10 a. m., at Hotel Bentley, Alexandria, Louisiana.

Alexandria, La.,
Bentley Hotel, April 1, 1915—10 a. m.

Met pursuant to adjournment, at the Bentley Hotel, Alexandria, Louisiana.

Parties present as before.

WALTER L. BOLDEN, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
205 A. Walter L. Bolden; age, 28; Alexandria, La.; Druggist. I am in charge of the Retail Department of the Rapides Drug Company, of Alexandria, La.

Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine, in your store?

A. Yes, sir.

Q. 3. Whose product do you recognize this to be?

A. Eli Lilly & Co.

Q. 4. How do you dispense it?

A. Both on physician's prescriptions and direct to customers in our own bottles.

Q. 5. Have you ever had a prescription calling for Quin-Coco, in your store?

A. No, sir, I have not.

Q. 6. Have you ever had a customer call for Quin-Coco?

A. No, sir, I don't recollect ever having had a call for Quin-Coco.

Q. 7. How long have you been handling Coco-Quinine?

A. About ten years.

Q. 8. Do you have ocnsiderable call for it?

A. Yes, sir.

Q. 9. Do you ever receive calls for a product by any other name than Coco-Quiinine?

A. Sometimes have calls for chocolate quinine.

Q. 10. Whose product do you understand is intended when chocolate quinine is called for?

A. I understand that they want Coco-Quinine, Lilly's Coco-Quinine.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 11. Have you ever handled and dispensed Quin-Coco made by Warner & Co.?

A. I don't remember ever to have handled Quin-Coco?

206 X Q. 12. So if you have a call for a chocolate quinine preparation you have nothing to fill it with except Coco-Quinine, Lilly?

A. Yes, sir.

X Q. 13. You say your sales of Coco-Quinine have been considerable. Is there much malarial fever or malaria around this country?

A. Yes, sir, we have considerable malaria.

X Q. 14. Is it less than it was ten years ago?

A. I think it is less, although I have only lived here eight years.

X Q. 15. What is quinine sulphate in its various combinations with chocolate or anything else, used for? I mean what diseases.

A. It is used as an antidote for malaria, colds, &c. I would say fevers but that comes under the head of malaria, too.

X Q. 16. Is not most of it sold for malaria or malarial fevers?

A. I think so.

Cross-examination closed.

WALTER L. BOLDEN.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

ALFRED L. SOULIER, a witness called by and on behalf of the plaintiff, having being first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

207 A. Alfred L. Soulier; age, 37; Alexandria, La.; Druggist, Retail Druggist, Proprietor of the Soulier City Drug Store.

Q. 2. How long have you been in the drug business and where?

A. Well, about twenty years. I was connected with Estorde Drug Company at New Iberia up to 1902. That was a jobbing house with a retail department. I then went with the Rapides Drug Company, of Alexandria, La. This is also a jobbing house with a retail department. For the last two years I have been in the retail drug business as proprietor of the Soulier City Drug Store.

Q. 3. What do you know about a pharmaceutical product known as Coco-Quinine?

A. I understand it to be a quinine preparation with a chocolate base with a certain percentage of quinine.

Q. 4. How long have you known of this product and whose product do you recognize it to be?

A. About eighteen years, the product of Eli Lilly & Co.

Q. 5. While in the employ of the two jobbing houses with reta departments mentioned in your former answer, were you in a positio to know of the orders and prescriptions that came into the respecti stores?

A. Yes, sir.

Q. 6. Did both of these stores handle the product known as Coc Quinine?

A. Yes, sir.

Q. 7. Did they have a considerable trade in such product?

A. Yes, sir.

Q. 8. In both the wholesale and retail departments?

A. Yes, sir.

Q. 9. How is such product dispensed?

A. On prescriptions and on calls, in our own bottles.

208 Q. 10. Have you ever seen a prescription written by physician for a product called Quin-Coco?

A. No, sir.

Q. 11. Have you ever received an order from a customer eith wholesale or retail, for a product called Quin-Coco?

A. I can't say that I remember having.

Q. 12. Do you mean that you do not remember ever having r ceived such a call?

A. Yes, sir.

Q. 13. Do you handle the product called Quin-Coco in your store

A. No, sir.

Q. 14. Why don't you handle it?

By Mr. Rawle: Objected to as irrelevant.

A. For the reason I consider it a substitute for the Coco-Quinine.

Q. 15. What is the policy of your store concerning so called sub stitutes?

(Same objection.)

A. Well, we don't substitute at all.

Direct examination closed.

No Cross-examination.

ALFRED L. SOULIER.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

R. L. RANDOLPH, a witness called by and on behalf of the plaintif having been first duly sworn, deposes and says as follows, in answe to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation

209 A. R. L. Randolph; age, 51; Alexandria, La.; Physician.

Q. 2. Are you familiar with a pharmaceutical produc

known as Coco-Quinine, and if so, what do you know of it and whose product is it?

A. As I understand it is a product manufactured by Eli Lilly & Co., containing two grains of sulphate of quinine to the dram. I have known and used it for many years.

Q. 3. Do you prescribe it for your patients in your practice?

A. I do.

Q. 4. How do you commonly write your prescriptions?

A. Coco-Quinine, so much a dose, as necessary.

Q. 5. Do you ever prescribe a product called Quin-Coco?

A. No, I know of no such product. Never heard of it.

Direct-examination closed.

No Cross-examination.

R. L. RANDOLPH, M. D.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

FIELD V. GREMILLION, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Field V. Gremillion; age, 34; Alexandria, La.; Physician and Surgeon.

210 Q. 2. Do you know of a pharmaceutical product known as Coco-Quinine, and if you do, will you state whose product it is, and what you know about it?

A. It is the product made by Eli Lilly & Co., and contains chocolate and quinine sulphate, two grains of quinine sulphate to the teaspoonful.

Q. 3. Do you prescribe this product for your patients in your practice?

A. Yes, sir.

Q. 4. How long have you been so using it?

A. Since I have been practicing medicine, four years.

Q. 5. How do you write your prescriptions for this product?

A. Just "Coco-Quinine," followed by the directions suitable for the case.

Q. 6. Did you ever hear of a product called Quin-Coco?

A. No, sir.

Direct examination closed.

No Cross-examination.

FIELD V. GREMILLION.

Subscribed and sworn to before me this 1st day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

CAMILLE F. GRAVEL, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Camille F. Gravel; age 38; Alexandria, La.; I am Sec-
211 retary and Treasurer and General Manager of the Rapides Drug Company, Limited, Wholesale Druggists of this City. We also have a Retail Department.

Q. 3. Do you handle a product known in the trade as Coco-Quinine?

A. Yes, sir.

Q. 4. Whose product do you recognize it to be?

A. Eli Lilly & Co.

Q. 5. How long have you handled this product?

A. Ever since I have been in the drug business, ten or twelve years.

Q. 6. What territory does your wholesale store serve?

A. Approximately seventy-five to a hundred miles around Alexandria.

Q. 7. Do you sell considerable Coco-Quinine, and are the sales general throughout your territory?

A. We sell quite a quantity, several gallons a month, and sell it generally throughout our territory.

Q. 8. Did you ever receive an order for Quin-Coco?

A. Not that I remember.

Q. 9. Did you ever see a physician's prescription written for Quin-Coco?

A. I never have.

Q. 10. If any order was received at your store for Quin-Coco would it be likely to be called to your attention?

A. It would, for the reason that it would be put on "short" list, and I order all the goods and see all the "short" lists.

Q. 11. Do you handle Quin-Coco?

A. We do not.

Q. 12. Why do you not?

A. Because we have no demand for it and we consider it a substitute for Coco-Quinine.

By Mr. Rawle: Question and answer objected to as irrelevant.

Direct-examination closed.

212 Cross-examination.

By Mr. Rawle:

X Q. 13. How long have you been selling any drugs in this general territory?

A. About twelve years.

X Q. 14. Is not quinine sulphate, in whatever form, used chiefly for malaria or malarial fevers?

By Mr. Bradford: Objected to as immaterial.

A. I am not a registered pharmacist and I am not posted as to the physiological effect of drugs.

X Q. 15. Do you mean that you do not know what diseases quinine sulphate is used for?

By Mr. Bradford: Same objection.

A. I know that it is used for malaria and fevers, but have made no study of pharmacy.

X Q. 16. By "fever" do you mean malarial fever?

(Same objection.)

A. I think so.

X Q. 17. Have you any idea whether malaria and malarial fevers are less prevalent in your territory than they were when you first sold drugs here?

By Mr. Bradford: Objection repeated and this and the previous questions are further objected to on the ground that they are not proper cross-examination.

A. I have no way to ascertain that.

Cross-examination closed.

CAMILLE F. GRAVEL.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Hotel Majestic, Lake Charles, La., at 8 o'clock p. m., this day.

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Lake Charles, La.,
Majestic Hotel, April 1st, 1915—8 p. m.

Met pursuant to adjournment at the Majestic Hotel, Lake Charles, Louisiana.

Parties present as before.

ALLEN J. PERKINS, a witness, called by and on behalf of the plain-

tiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Allen J. Perkins; age, 49; Lake Charles, La.; Physician and Surgeon.

Q. 2. In your practice do you use a pharmaceutical preparation known as Coco-Quinine, and if so, whose product do you recognize this to be?

A. Yes. I recognize it to be a product put upon the market by Eli Lilly & Co. I use a good deal of it.

Q. 3. How do you write your prescriptions for this product?

A. "Coco-Quinine," and sometimes I specify Lilly's, and when I don't it is understood that my intention is to prescribe Lilly's product, that being the one I have learned to recognize as the originator of the medicine.

Q. 4. How long have you used this product, if you remember?

A. Four or five years, I can't recall exactly, perhaps more. In ninety-nine cases out of a hundred when I use it I write the prescriptions for it or phone the druggist to send out so many ounces as needed to the patient.

214 Q. 5. You say that when you write the prescriptions for Coco-Quinine that it means Lilly's product. What would you say if a druggist should fill such a prescription with some other product?

A. To tell you the truth I never knew that there was any other product that was used as a substitute for it.

Q. 6. I mean from an ethical standpoint, how would you regard the filling of such a prescription with another product?

A. I should regard it as a substitution.

Q. 7. How do you feel or what is your opinion of the practice of substitution and what are your reasons for your opinion?

By Mr. Rawle: Objected to as irrelevant.

A. I always think that substitution should be condemned because a physician is not always in a position to know what drug is being substituted and whether it has the same medicinal value as the original which he intends to prescribe.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Doctor, if a druggist about to dispense one of your prescriptions, happens to be out of some ingredient and has to substitute therefor, it is al- right for him to make a substitution by getting your specific assent to it, is it not?

A. Well, if he hadn't an ingredient in a prescription that I write

he should not fill that prescription until he got my consent to make the substitution.

X Q. 9. And that would be a substitution, would it?

A. Well, it wouldn't be a substitution if he got my consent to do it. It wouldn't be a substitution in the strict sense of the word.

X Q. 10. But it wouldn't be very unusual would it to use
215 "substitution" in the broad sense to cover a change of ingredient both with or without your consent?

A. No druggist substitutes where he gets the consent of a physician to make a change of ingredients in a prescription, because that then becomes my intended prescription.

My idea of a substitution is where he uses without my consent some ingredient other than I write in the prescription.

X Q. 11. Does the druggist in such cases sometimes use the telephone?

A. Yes.

X Q. 12. And he perhaps would say to you "Dr. I am out of such and such a drug, can I substitute such and such another drug in your prescription?"

A. If it met with my approval I consent to the change.

X Q. 13. Is that about the conversation that takes place?

A. That is about the conversation.

X Q. 14. For what diseases do you chiefly prescribe Quinine Sulphate, or any form of quinine or quinine in any combination?

By Mr. Bradford: Objected to as immaterial and as not cross-examination.

A. I use quinine for malaria, for la grippe, for intestinal intoxication and whooping cough and parasitical diseases, and in small doses as a tonic.

X Q. 15. For which of these diseases do you have the most frequent cause for prescribing the drugs I have mentioned in my last question? In answering this question, consider that I am inquiring as to your use of Cinchona and its derivatives, either alone or combined with some other drug or a vehicle?

By Mr. Bradford: Same objection.

A. Malaria.

X Q. 16. Without desiring to injure the value of real
216 estate in this part of the world, has malaria been somewhat prevalent here and hereabouts?

(Same objection.)

A. There is not a great deal of malaria in this part of the country. We are getting pretty free of malaria.

X Q. 17. Has there been a diminution of malaria in late years and down to the present time and to what extent? I refer to the surrounding territory that you are familiar with.

By Mr. Bradford: Same objection.

A. I consider there has been a very great diminution of malaria in this country in the last fifteen years and notably so in the last two or three years.

As to the actual percentage I could not state.

Cross-examination closed.

Redirect-examination.

By Mr. Bradford:

R. D. Q. 18. Has any druggist ever obtained your consent to change one of your prescriptions calling for "Coco-Quinine" to "Quin-Coco?"

A. No.

A. J. PERKINS, M. D.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

CHARLES C. BROUSSARD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

217 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Charles C. Broussard; age, 27; Alexandria, La.; Traveling Salesman for Eli Lilly & Company, of Indianapolis, Indiana.

Q. 2. How long have you been in your present employment and where were you employed prior thereto?

A. I have been in the employ of Eli Lilly & Co. since October 1913, and prior to that time I was connected with the Rapides Drug Company, of Alexandria, La.

Q. 3. What can you tell us about Coco-Quinine?

A. Coco-Quinine is a product offered by Eli Lilly & Co. to the trade as a tasteless syrup of quinine, put up in a chocolate form.

Q. 4. Do you sell it, and if so, what kind of a demand is there for it?

A. Yes, sir; I do sell it and there is a large demand for it.

Q. 5. What territory do you cover?

A. Southern Louisiana.

Q. 6. What do you know about Quin-Coco and what can you tell us in reference thereto?

A. Quin-Coco is a preparation offered by William R. Warner & Co. as a substitute for Coco-Quinine.

By Mr. Rawle: Objected to as hearsay.

Q. 7. Do you meet much of it in the retail drug stores of your territory?

A. Quite a lot of it.

Q. 8. Tell us anything you know in regard to the extent of it

use and as to its being used as a substitute for Coco-Quinine, and when Coco-Quinine is called for on prescriptions or otherwise at the retail stores?

By Mr. Rawle: Objected to as necessarily calling for hearsay.

A. Well, I know that it is substituted for Coco-Quinine
218 in prescriptions and sold over the counter as a substitute for Coco-Quinine, because I have seen it sold. As to what extent I don't know just how much of it is being done.

By Mr. Rawle: The answer is objected to as hearsay, and because the act of a druggist in such case does not in any way affect the rights of the defendant and because the evidence is irrelevant and immaterial.

Q. 9. Have you seen prescriptions calling for Coco-Quinine filled with the product called Quin-Coco? If so, please relate the circumstances?

By Mr. Rawle: Objected to because no act of the druggist under the circumstances stated in the question can affect the rights of the defendant, and as irrelevant and immaterial.

A. I have seen prescriptions calling for Coco-Quinine filled with Quin-Coco in two or three instances.

I can't recall just who the parties are that have done the substituting.

Q. 10. Do you recall any circumstances bearing upon this subject whatever? If so, please relate?

By Mr. Rawle: Objected to for the same reasons and because the witness has already fully answered the question.

A. I remember calling on a druggist about two weeks ago and while there I saw him fill a prescription for Coco-Quinine out of a bottle labeled "Quin-Coco."

I took up the matter with him and told him that he was doing the wrong thing by substituting and he said he didn't think that he was substituting inasmuch as he thought that Quin-Coco was the same preparation as Coco-Quinine.

I asked him if he sold the preparation altogether for Coco-Quinine and he said he did, buying the preparation in five gallon lots enabling him to get a much better price on this product than on Coco-Quinine.

219 Q. 11. Can you give the name of this druggist?

By Mr. Rawle: Same objection.

A. No, sir, I wouldn't like to do it.

Q. 12. Please give your reasons for wishing not to give his name?

A. Well, in the first place, after explaining the situation to this party he stated that not being a druggist himself his pharmaceuticals were bought by his prescription clerk, and that he supposed that his prescription clerk was buying just what was called for and what

was in demand. He promised, however, that he would fill his prescriptions with Coco-Quinine only from and after that date, and believing the man to be conscientious, I would not like to give his name.

Direct examination closed.

By Mr. Rawle: I give notice that unless the witness states the name of the druggist referred to and asked in the question of opposing counsel, he will move the court to strike the deposition from the record.

Mr. Rawle, not waiving his objections, cross-examines as follows:

X Q. 13. State the name of the druggist you have just referred to?
A. I have already said I didn't care to state the name.
X Q. 14. Question repeated.
A. Same answer.
X Q. 15. In what city or town or parish or political district was his drug store?
A. If I was to tell the name of the town in which he is located I would be naming him as there is only one drug store in the town.
X Q. 16. When was this?
A. I don't understand the question?
X Q. 17. When did the circumstance take place to which you have been referring?
220 A. About two weeks ago.
X Q. 18. Did you have the prescription in your hand at the time?
A. The prescription was on the file and while I did not take it off the file, I handled it, while referring to the druggist to the fact that it was for Coco-Quinine and not for Quin-Coco.
X Q. 19. Where were you standing at the time?
A. I was standing right opposite the man across the counter from him. He had his prescription file on the counter making a charge for this prescription.
X Q. 20. Did you read the prescription?
A. I must have read it since I say it was written "Coco-Quinine."

(Mr. Rawle requests the Special Examiner acting as an officer of the court to instruct the witness that he is legally bound to answer X Q. 13.)
(The Special Examiner replies that he does not understand that it is his duty or authority to instruct the witness in this regard.)

X Q. 21. I repeat X Q. 13 and ask you to give the name of the druggist you have referred to in answer to Q. 10?

By Mr. Bradford: Counsel for plaintiff expresses his entire willingness to have the name of this particular druggist given. Otherwise he would not have asked the question originally. He is in ignorance of the witness's reason for declining to answer and without knowing this reason refrains from advising the witness as to his duty. He asks counsel for defendant if he has any objection to a

private consultation between the witness and counsel for plaintiff, on this subject only, before the witness again answers.

By Mr. Rawle: Mr. Rawle pointing out that the witness having already given his reason for not answering prefers not to
221 consent to the somewhat unusual course suggested by opposing counsel.

A. I cannot give the name of the druggist because I promised him that in case anything should come up about this substitution I wouldn't say anything about it.

X Q. 22. Did you report the matter to the home office at Indianapolis or to any person connected with your employer?

A. Not any more than I have said here.

X Q. 23. Question repeated.

By Mr. Bradford: I object to this question as the witness's previous answer was full and complete to the inquiry propounded in X Q. 22.

A. I haven't reported any more of this matter and not even as much as what I have stated in my previous statement.

X Q. 24. Have you mentioned to anybody the name of the druggist?

A. No, sir.

X Q. 25. Did you mention it to opposing counsel before you testified?

A. Mention the name?

X Q. 26. To this gentleman (indicating Mr. Bradford)?

A. I mentioned the name to no one.

X Q. 27. Have you at any time informed opposing counsel that you would not divulge the name of this druggist to him?

A. Well, in conversation I told him about this incident and he asked me whether or not I would have any objection in stating the name of this party and I told him I would rather not.

By Mr. Bradford: In justice to the witness, counsel for plaintiff desires to state that the witness did not tell him the name of the druggist and that he had entirely forgotten that the witness
222 had expressed a desire not to do so. Otherwise he should not have asked the original question.

(Mr. Rawle gives notice that he will at the proper time move to strike out the deposition of this witness, because of his recalcitrancy in refusing to answer X Q. 13, X Q. 14, X Q. 15 and X Q. 21.)

Cross-examination closed.

CHARLES C. BROUSSARD.

Subscribed and sworn to before me this 1st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Friday, April 2, 1915, at Hotel Mahaffey, Jennings, La., at 9.30 a. m.

Jennings, La.,
Hotel Mahaffey, April 2, 1915—9.30 a. m.

Met pursuant to adjournment, at the Hotel Mahaffey, Jennings, La.

Parties present as before.

RICHARD D. BOWDEN, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

Q. 1. Please state your name, age, residence and occupation?
A. Richard D. Bowden; age, 34; Jennings, La.; Druggist, Manager for Parker-Blake Company, Retail Drug Store in this City.
223 Q. 2. Do you handle a pharmaceutical product known as Coco-Quinine?
A. Yes, sir.
Q. 3. Whose product do you recognize Coco-Quinine to be?
A. Eli Lilly & Company.
Q. 4. Did you know of any other cocoa or chocolate quinine preparation before Eli Lilly & Co. put Coco-Quinine on the market?
A. No.
Q. 5. How do you dispense Coco-Quinine in your store?
A. Both on prescriptions and on call, in our own bottles.
Q. 6. Have you ever purchased a product called Quin-Coco, and if so, from whom?
A. Yes, from B. F. Jones, I believe is his name, representing William R. Warner & Co.
Q. 7. For what purpose do you purchase Quin-Coco?
A. For the purpose of sale.
Q. 8. How do you dispense Quin-Coco?
A. In the ordinary manner.
Q. 9. Do people come into your store and ask for Quin-Coco?
A. No, I have not had any calls for that.
Q. 10. On what calls do you supply Quin-Coco, what kinds of calls?
A. Usually on a call for Coco-Quinine.
Q. 11. In your opinion is Quin-Coco a good substitute for Coco-Quinine?

By Mr. Rawle: Mr. Rawle here objects to the testimony of this witness on the ground that it is between third parties and does not affect the rights of the defendant.

A. I have never had any kicks about it.

Direct-examination closed.

224 Cross-examination.

By Mr. Rawle, without waiving his objections:

X Q. 12. Would you, as an honest druggist, consider it honest, when a customer over the counter calls for one drug or preparation to sell him a different drug or preparation, without explaining to him? I am merely asking your point of view of such a transaction.

By Mr. Bradford: Objected to as immaterial.

A. Why I consider that just as honest as the man who sold it to me.

X Q. 13. I am asking you whether, as an honest druggist, it would be, in your opinion, man to man, an honest transaction? Please give your own point of view without regard to anybody else.

By Mr. Bradford: Same objection.

A. I consider neither of those transactions honest.

X Q. 14. Then, if you don't consider the transaction honest, I shall assume that the transaction you referred to of supplying Quin-Coco "usually on a call for Coco-Quinine," has not been done by you in any dishonest or unfair way. Am I correct?

By Mr. Bradford: Same objection.

A. No, you are wrong. I simply supply it because I get a better price on it and dispense it to save a little money. The preparation called for was Coco-Quinine and I should have dispensed Coco-Quinine.

X Q. 15. And you say that wasn't an act of an honest druggist, do you?

A. I must say that.

X Q. 16. Did you give the customer in such cases any understanding at all of what he was getting?

A. I gave him to understand by implication that he was getting Coco-Quinine, in fact it was labeled "Coco-Quinine."

X Q. 17. You have at times handled and sold both Coco-
225 Quinine and Quin-Coco, have you not? I mean had them in stock at the same time.

A. Yes, sir.

X Q. 18. When you have had them both in stock at the same time, for what reasons or reason, do you decide to sell the customer the one or the other?

A. Why, I suppose it is a matter of convenience at times. At other times it is probably just a little thought of price, of gain.

X Q. 19. Who owns this drug store of which you are the manager?

A. Parker-Blake Company, Limited, of New Orleans, La.

X Q. 20. Are they wholesale or retail sellers of drugs?

A. They are retailers in Jennings.

X Q. 21. Have they retail stores in New Orleans?

A. No, sir.

X Q. 22. Then so far as New Orleans business is concerned, they are wholesale druggists, are they not?

A. I only have to do with their store here. I don't know anything about their New Orleans or any other business.

X Q. 23. Do they do a wholesale drug business?

A. They do.

X Q. 24. Have you charge of their retail drug business in this town?

A. I have.

X Q. 25. You have said that you have made these sales of Quin-Coco in place of Coco-Quinine. Please state if you have done this by the instructions or with the knowledge of your employers, the Parker-Blake Company, Limited, of New Orleans, La.?

By Mr. Bradford: Objected to as immaterial.

A. I don't refer to them for every individual transaction. I run the store to suit myself.

X Q. 26. Have your employers had any knowledge of such transactions on your part?

By Mr. Bradford: Same objection.

226 A. No, they haven't.

X Q. 27. Did they ever give you any instructions to do that sort of thing or suggest to you that you should do it?

By Mr. Bradford: Same objection.

A. I don't think that the conditions of affairs between my employers and myself have any bearing on the present question.

X Q. 28. You are here as a witness and Mr. Riordon is an officer of the court and it is your obligation to answer questions put to you. Unless they tend to incriminate you or render you liable to criminal prosecution.

Do you consider that an answer to this question would render you liable to criminal prosecution?

By Mr. Bradford: Same objection. The further objection to this question is made that in view of the witness's answer to X Q. 23, wherein he stated that his employers had no knowledge of such transactions on his part being a full and frank answer to the inquiry propounded, any further questioning along this line is improper. It is further objected to as not cross-examination and as wholly irrelevant, incompetent, and immaterial.

A. Under the laws of the State of Louisiana the manager of the store is absolute manager and conducts the same in his own way and as his own place.

X Q. 29. Question X Q. 28 repeated?

By Mr. Bradford: Same objection.

A. No, I don't think it would, yet I have considered the question

irrelevant as it is matter left personally between my employers and myself and does not embrace the subject of this examination.

X Q. 30. I repeat X Q. 27. Please answer it.

By Mr. Bradford: Objection repeated.

227 A. I am not going to answer that any other way unless I am told to.

Mr. Rawle gives notice that for the refusal of the witness to answer a proper question he will, at the proper time, move the court to strike his entire deposition from the record, and also for other reasons.

Mr. Bradford acknowledges the notice with pleasure.

X Q. 31. Would your employers approve of the kind of transaction you have testified to?

By Mr. Bradford: Objected to as incompetent and immaterial.

A. I will ask them the next time I see them.

X Q. 32. Do you do the buying for your store in Jennings?

A. Yes, sir.

Cross-examination closed. R. D. BOWDEN.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

BERNA C. FRY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Berna C. Fry; age, 37; Jennings, La.; Physician.

228 Q. 2. Are you familiar with a phramaceutical product known as Coco-Quinine, and if so, what can you tell us about it?

A. I am familiar with it from the fact that I have been prescribing it for the last twelve or fourteen years.

Q. 3. Whose product do you recognize it to be?

A. Lilly's, of Indianapolis.

Q. 4. Did you know of any other cocoa or chocolate quinine preparation before Coco-Quinine was introduced to the profession by Eli Lilly & Co.?

A. No, sir.

Q. 5. How do you write prescriptions for Coco-Quinine?

A. I write simply for "Coco-Quinine."

Q. 6. Whose product do you intend when you write a prescription for "Coco-Quinine?"

A. The product of Lilly & Co.

Q. 7. Did you ever write a prescription for a product called "Quin-Coco?"

A. Not that I remember.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. In your professional work do you usually prescribe medicines by giving written prescriptions to be filled by a druggist or do you mostly or sometimes yourself furnish the article to the patient?

A. In city work I always prescribe. In country calls I sometimes take with me the medicines that I may need.

X Q. 9. Approximately about what would be the relative proportion of instances in which you prescribe, and on the other hand in which you carry the medicines with you and furnish them yourself to the patient?

A. I don't suppose I furnish drugs in more than ten per
229 cent of my practice. That is a question I cannot answer with any degree of accuracy.

X Q. 10. But you consider ten per cent a fair approximation?

A. It may be a fair approximation. I cannot say that I consider it a fair approximation as I have no data.

X Q. 11. What do you consider as a fair approximation?

By Mr. Bradford: Objected to as immaterial and for the further reason that the witness has already answered the question.

A. It is simply guess work, it is simply a guess proposition.

X Q. 12. Then what is your best guess?

A. Possibly five per cent of my calls I furnish some medicine. I don't furnish all medicine in any case.

X Q. 13. Are you in the habit of carrying Coco-Quinine into the country and dispensing it to patients? I mean on your visits to patients?

A. The only time that I carry bulky preparations of that character is when I suspect that I may have occasion to use it. Then I get it from the drug store and take it with me to the individual case.

X Q. 14. In furnishing yourself with any preparations for the purpose of dispensing them to patients in the cases or class of business that you have mentioned do you buy from the drug store or from the jobber or the manufacturer or which?

A. Local druggist.

X Q. 15. In your professional opinion have malaria and malarial diseases diminished during the last five years in and about this town? Or wherever you have an acquaintance with the subject?

By Mr. Bradford: Objected to as not cross-examination and as an attempt by counsel to make the witness his own.

230 A. They have, yes, sir.

X Q. 16. Give your opinion as to the extent of such diminution?

By Mr. Bradford: Same objection.

A. It is hard to answer that question accurately, but I should say about fifty per cent diminution.

X Q. 17. Is it not true that the chief demand for cinchona derivatives either alone or in any preparation is, in your practice, for malaria and malarial diseases?

By Mr. Bradford: Same objection.

A. It is.

Cross-examination closed. BERNA C. FRY, M. D.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

VALLEIX B. RICHARD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Valleix B. Richards; age, 35; Jennings, La.; Retail Druggist, Proprietor of the Phenix Drug Store.

Q. 2. Do you handle a product known as Coco-Quinine, and if so, whose product do you recognize this to be?

A. I do. Eli Lilly & Company's.

Q. 3. How do you dispense this product in your store?

A. Both on prescriptions and on call, in our own bottles.

231 Q. 4. Do you handle a product called Quin-Coco? And if so, where do you buy it?

A. I do. From William R. Warner & Co., St. Louis.

Q. 5. What were your reasons for buying Quin-Coco?

By Mr. Rawle: Objected to as irrelevant, and as calling for evidence that could not affect the rights of the defendant.

A. The principal reason was to get a cheaper preparation of chocolate quinine.

Q. 6. What representations were made to you by the representative of William R. Warner & Co. when your order was first solicited for this preparation?

A. He asked me if I handled much Coco-Quinine and said he had a preparation that he thought was better and asked me to get some of it and show it to my doctors and ask them if they would use this instead of Coco-Quinine and that it would be more money in it for me.

Q. 7. Would you have purchased Quin-Coco if Coco-Quinine had not been on the market?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. I suppose not.

Q. 8. Was it understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to as irrelevant and as leading and as immaterial, and because what was understood is not evidence.

A. Yes.

Q. 9. Have you so used it?

A. Yes.

Q. 10. Is there any demand for Quin-Coco by that name at your store?

232 A. A little.

Q. 11. Do customers ever ask for Quin-Coco over the counter?

A. They ask for a chocolate quinine and sometimes Coco-Quinine, but never Quin-Coco.

Q. 12. How long have you been selling Coco-Quinine, the product of Eli Lilly & Co.?

A. I should say about ten years.

Q. 13. So far as you know was this product an original product with Eli Lilly & Co.?

A. I think it was.

Q. 14. Is Quin-Coco of the same color and the same flavor as Coco-Quinine?

A. I never tasted either one, but they seem to be about the same preparation, in appearance. Quin-Coco may be a little darker in color than Coco-Quinine.

Q. 15. Do you think you could tell the difference if shown the respective products in separate bottles at different times? I mean not side by side.

A. I am not positive that I could.

Q. 16. If Quin-Coco was of a different color and a different flavor would it then be possible to use it as a substitute for Coco-Quinine, or to supply it when Coco-Quinine was called for without detection?

A. Certainly not if it was not a similar preparation.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. I take it that you are an honest druggist, in your own opinion of what an honest druggist should be?

A. About the average I expect.

X Q. 18. Have you dishonestly passed off Quin-Coco for Coco-Quinine with the effect of deceiving the customer?

233 By Mr. Bradford: Objected to in the form stated as tending to ask the witness for an answer that might incriminate himself.

By Mr. Rawle: Mr. Rawle seriously objects to the objection of the opposing counsel which is meant for the witness and not for the court.

By Mr. Bradford: Mr. Bradford denies and resents the imputation of the objection of counsel for defendant.

A. I have sold Quin-Coco when Coco-Quinine was called for, not with the intention to defraud the customer but believing I was giving him as good a preparation as what he asked for, which, of course, was wrong.

X Q. 19. What do you mean by saying that it was understood at the time that Quin-Coco could be used to supply the demand for Coco-Quinine?

A. My attention was called to the preparation Quin-Coco by William R. Warner & Company's salesman and he told me that it was very similar to Coco-Quinine which I saw it was. He didn't advise me to substitute it for Coco-Quinine; but said it could be done without detection.

X Q. 20. When was this?

A. I can't remember the date.

X Q. 21. About when was it? Months ago or years ago?

A. Possibly three or four years ago.

X Q. 22. What was his name?

A. B. F. Jones, I think that was his name.

X Q. 23. I ask you to state the exact words he used when he made such a statement to you? State them just as he said them, and what you said.

A. Of course a person can hardly remember a conversation that occurred three years or so ago. But to the best of my recollection this was the conversation: Mr. Jones asked me "Do you use much
234 Coco-Quinine?" I said "Yes." He said "Why don't you try our preparation of Quin-Coco." I said "Is it like Coco-Quinine?" He said "You can't tell the difference." And after looking over the sample I bought some. He said "You will find this a much better preparation than Coco-Quinine."

X Q. 24. Is that all he said on the subject, during the entire interview?

A. As I said before it is very difficult to remember a conversation which occurred over three years ago and, as I answered in the earlier part of this examination he advised me to show it to physicians and ask them to prescribe it.

X Q. 25. Anything else said? If so, give his exact words?

A. That is all that I can remember pertaining to this subject.

X Q. 26. In answer to my questions you have now stated, as I understand you to say, the entire conversation that took place between you and Warner's salesman on this subject?

By Mr. Bradford: Objected to as a misstatement of the witness's testimony.

A. I don't understand exactly what you mean?

X Q. 27. I have been asking you to state exactly what was said on this occasion by the Warner salesman to you and what you said to the Warner salesman, giving the language used by each of you. I am now asking you whether you have now stated in answer to my questions, all that passed between you. If there is anything more that passed between you that you have not stated in answer to my questions, please proceed to state it?

By Mr. Bradford: Objection repeated.

A. I don't remember anything more of this conversation.

X Q. 28. And your belief is that there was nothing more
235 said except what you have stated in answer to my questions, is that correct?

A. No doubt there was more said on the subject but as it occurred so long ago I cannot recall exactly what was said by either of us. But if you will ask me some definite question regarding the conversation I may be able to recall it.

X Q. 29. You have said that Jones requested you to show it to doctors and ask them to use it instead of Coco-Quinine. Is that right?

A. He did.

X Q. 30. What did he say about your selling it over the counter, if he said anything give his exact words?

A. I can't recollect.

X Q. 31. Did he say anything on that subject?

A. I do not remember.

X Q. 32. Did he make you any dishonest proposition?

A. I am positive he did not.

X Q. 33. Do your doctors in treating patients chiefly do it by prescriptions or do they dispense their own preparations or drugs to the patient?

By Mr. Bradford: Objected to as immaterial.

A. Chiefly by prescriptions. Nearly entirely so.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 34. Was anything said in the conversation between yourself and Mr. Jones relative to the comparative cost of the two preparations Coco-Quinine and Quin-Coco?

By Mr. Rawle: Objected to as not proper re-direct-examination as the subject has already been fully developed by counsel.

236 A. Yes, he showed that his preparation was cheaper than Coco-Quinine. Naturally, I could make more money by selling his than Coco-Quinine.

Deposition closed. VALLEIX B. RICHARD.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Beaumont, Texas, this afternoon, at 5.30 o'clock, at Hotel Crosby.

Beaumont, Texas,
Crosby Hotel, April 2, 1915—5.30 p. m.

Met pursuant to adjournment, at the Crosby Hotel.

Parties present as before.

WILLIAM C. CHESTNUTT, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William C. Chestnutt; age, 32; Port Arthur, Texas; Druggist, in the employ of the Caswell-Preston Drug Company, Retail Druggists, of Beaumont, Texas. I was formerly Proprietor for three years of the Corner Drug Co., of Port Arthur, Texas. I have been here one year. I have been in the Drug business about fifteen years, in various places.

237 Q. 2. Do you handle and have you handled in various drug stores where you have been either as proprietor or as clerk, a pharmaceutical product known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. Yes, sir, I have and recognize it to be the product of Eli Lilly & Company.

Q. 3. How long have you been familiar with this product?

A. I have been at least acquainted with it for ten years, and have been using it regularly.

Q. 4. Did you know of any other Coco-Quinine or chocolate quinine preparation on the market prior to the time Coco-Quinine was introduced by Eli Lilly & Co.?

A. I did not.

Q. 5. Do you recognize Coco-Quinine to be a preparation original with the Eli Lilly & Co.?

A. Yes, sir.

Q. 6. How have you been accustomed to dispense this product?

A. Both on prescriptions and over the counter, both ways, and to a great extent. There is a constant demand for it.

Q. 7. How are prescriptions for this product usually written by physicians?

A. They are written for "Coco-Quinine" and are specified in some cases by the doctors until they get acquainted with the druggist and after that they don't deem it necessary.

Q. 8. How do customers ask for Coco-Quinine when they ask for it over the counter?

A. Ninety-five per cent. ask for Coco-Quinine and sometimes they say give me a bottle of cocoa or chocolate quinine or whatever it is, they use both names. Most of those that ask that way want to be put right. They say give me a bottle of cocoa or chocolate quinine.

Q. 9. Whose product do you understand is intended when it is asked for in this way?

238 A. Lilly's. Not knowing or recognizing any other Coco-Quinine that is the only one that I would give them.

Q. 10. Have you ever seen a prescription written for a product called Quin-Coco?

A. I never have.

Q. 11. Have you ever had a customer call for a product called Quin-Coco?

A. I never have.

Q. 12. Have you ever heard of the product called Quin-Coco, and if so, will you please relate the circumstances?

A. The first time it was represented to me it was claimed to be the same as Coco-Quinine. I did not buy it because I didn't care to substitute and being accustomed to using the other I considered it the original.

Q. 13. Who made the representations to you referred to in your last answer, and what were these representations in full?

By Mr. Rawle: I object because the only proper question is as to what was said at the time.

A. Mr. Richards, who was traveling for William R. Warner & Co. He asked me if I "didn't sell quite a lot of Coco-Quinine?" I told him "Yes" and he told me that he had something the same but cheaper. I didn't buy it.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. You have testified to a constant demand for Coco-Quinine at your store and to the great extent of your sales. What are cinchona derivatives either by themselves or in combination sold for?

By Mr. Bradford: Objected to as not cross-examination and wholly immaterial, incompetent and irrelevant.

239 A. Quinine is for chills and fever and for the malaria that they have here. It is absolutely necessary to give it.

X Q. 15. Hasn't there been a falling off in chills and fever and malaria in Beaumont and surrounding territory in the last five years?

By Mr. Bradford: Same objection.

A. I should say from the amount of prescriptions that it had been on an increase.

X Q. 16. Do the doctors in and around Beaumont furnish [illegible]

and preparations to their patients through prescriptions to be filled by druggists or do they keep a stock of such and furnish them direct to the patients themselves?

By Mr. Bradford: Same objection.

A. I would say that ninety-eight percent. is given by prescriptions.

X Q. 17. What is your own personal idea of the meaning of the word "substitute" as used above?

A. Well, Coco-Quinine is represented to the doctor by the detail man of the manufacturer. He tells the doctor the formulæ. The doctor prescribes it and specifies the same. And to use any other brand recommended to be the same would be, in my judgment, substituting.

X Q. 18. And it would be dishonest business on the part of the druggist?

A. Yes, sir. It would not give the patient the proper amount that the doctor had figured for him to take.

X Q. 19. You don't mean to say, do you, that Mr. Richards made a dishonest proposition to you, do you?

A. I do not. I only say that Mr. Richards offered me a cheaper preparation that he claimed to be the same. I did not know his formulæ. Perhaps it might have been the same.

240 X Q. 20. Is that all that passed between you on this subject?

A. I suppose that ended it when I told him that I wouldn't have anything else but Lilly's Coco-Quinine.

X Q. 21. Have you been in the habit of buying drugs and preparations from Mr. Richards?

A. I have bought from him, yes, sir.

X Q. 22. Rather steadily?

A. Not being the buyer now, I do not, but did while I was in actual business for myself. The buyer of the store I am now with buys some from him, I think. I am not positive.

Cross-examination closed.

Deposition closed.

W. C. CHESTNUTT.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

ROBERT L. GRIGSBY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert L. Grigsby; age 50; Beaumont, Texas; traveling salesman for Southern Drug Company, wholesale druggist, of Houston, Texas.

Q. 2. What territory do you cover?
A. Southeast Texas.
Q. 3. You sell a general line of pharmaceuticals?
A. I do.
241 Q. 4. Do you sell for your house a pharmaceutical product known as Coco-Quinine, and if so, whose product, if you know, is it?
A. I do. It is the product of Eli Lilly & Co., of Indianapolis.
Q. 5. How long have you handled this product?
A. Well as long as it has been on the market. I should say thirteen or more years.
Q. 6. Is there much demand for this product in your territory?
A. There is.
Q. 7. Give us an idea of the extent of your sales?
A. I sell approximately thirty to forty gallons a month.
Q. 8. Did you ever have any inquiry or demand for a product called Quin-Coco?
A. Never.
Q. 9. Are you familiar with the product called Quin-Coco, or or know anything about it?
A. Not further than seeing it on the shelves of a number of country drug stores and in dispensing physicians' offices.
Q. 10. Did you know of any cocoa or chocolate quinine preparation on the market before Coco-Quinine was offered by Eli Lilly & Co.?
A. I did not.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 11. Does your house stock a full Eli Lilly & Co. pharmaceutical line?
A. We do.
X Q. 12. On unspecified orders for pharmaceuticals to whose line of pharmaceuticals do you give a preference in filling the orders for a given drug or pharmaceutical?
242 A. Eli Lilly & Co., of Indianapolis.
X Q. 13. Why do you give them a preference over all other pharmaceutical manufacturers?
A. I am not in a position to state except from my own standpoint. We give Eli Lilly & Co., a preference on all pharmaceutical products on account of the Lilly policy. Eli Lilly & Co. ship nothing direct to the retail trade, but all orders are filled through the jobbers.
X Q. 14. To whom do Lilly & Co. sell their goods in all cases?
A. As far as I know to the jobbers.
X Q. 15. And so far as you know none are sold by Lilly & Co., to anybody but the jobbers?

By Mr. Bradford: Objected to as incompetent and immaterial.

A. As far as my territory is concerned they do not.

X Q. 16. If you had an order for a chocolate quinine preparation you would fill it with Coco-Quinine, wouldn't you?

A. I most certainly would.

X Q. 17. You have said that giving a preference to Lilly is the policy of your house. Do you know whether it has a contract to that effect with the Lilly Company?

By Mr. Bradford: Objected to as incompetent and immaterial.

A. I do not.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 18. Do you know whether the Southern Drug Company stocks pharmaceutical products of other manufacturers in general lines?

A. We do.

243 R. D. Q. 19. Do you sell the products of other manufacturers when there is any demand for them in your territory?

By Mr. Rawle: Objected to as irrelevant and not re-direct-examination.

A. We do.

R. D. Q. 20. How do you regard the Lilly pharmaceutical products as to quality in comparison with those of other manufacturers?

By Mr. Rawle: Objected to as irrelevant.

A. In the general line I recognize three pharmaceutical houses, namely, Eli Lilly & Company, Parke, Davis & Co., and Sharpe & Doehme, with specialties from other pharmaceutical manufacturers. I consider the Eli Lilly products equal to any on the market.

Re-direct-examination closed.

Deposition closed.

ROBERT L. GRIGSBY.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN S. FOSTER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

244 A. John S. Foster; age 28; Beaumont, Texas; druggist;

prescription clerk for the Caswell-Preston Drug Company, of this city.

Q. 2. Does your store dispense a product known as Coco-Quinine, and if so, whose product is it?

A. We do. We use Lilly's Coco-Quinine altogether.

Q. 3. How is this product dispensed in your store?

A. On prescriptions and we dispense it over the counter in our own bottles.

Q. 4. Do you have much of a demand for Coco-Quinine on prescriptions?

A. Yes, sir.

Q. 5. Do you sell much of it on call over the counter?

A. Yes, sir.

Q. 6. Are both demands constant with you?

A. Yes, sir.

Q. 7. Have you ever seen a prescription written for Quin-Coco?

A. No, sir.

Q. 8. Have you ever had a call over the counter for Quin-Coco?

A. No, sir.

Q. 9. How extensive is the prescription business of your store?

A. It is very large. We fill more prescriptions than any two stores in Beaumont.

Direct-examination closed.

No cross-examination.

Deposition closed.

JOHN S. FOSTER.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

245 EDWARD C. FERGUSON, a witness called by and on behalf of plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edward C. Ferguson; age 30; Beaumont, Texas; physician.

Q. 2. Are you familiar with a pharmaceutical product known as Coco-Quinine and if so, whose product is it?

A. Yes. I consider it to be Lilly's product.

Q. 3. Do you prescribe it in your practice?

A. Yes, frequently.

Q. 4. How do you write your prescriptions?

A. "Coco-Quinine."

Q. 5. Whose product do you intend when your prescriptions are so written?

A. Lilly & Company.

Q. 6. Have you ever written a prescription for a product called Quin-Coco?

A. No.

Q. 7. Did you know of any other cocoa or chocolate quinine product before the Lilly Coco-Quinine was introduced to the profession?

A. No.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Do your patients usually receive the medicine from your prescriptions filled at a drug store or direct from you?

A. From a drug store.

246 X Q. 9. About what per cent, if any, direct from you?

A. None.

Cross-examination closed.

Deposition closed.

EDW. C. FERGUSON.

Subscribed and sworn to before me this 2nd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Houston, Texas, Hotel Rice, tomorrow, Saturday, April 3, 1915, at 10.30 a. m.

Houston, Texas,
Hotel Rice, April 3, 1915—10.30 a. m.

Met pursuant to adjournment, at Hotel Rice, Houston, Texas.

Parties present as before.

GEORGE H. SPURLOCK, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. George H. Spurlock; age 38; Houston, Texas; physician.

Q. 2. How long have you been in the practice in Houston?

247 A. Since December, 1913.

Q. 3. Where were you prior to that time?

A. I started in practice in 1902 at Spurger, Texas; in 1903 and 1904 up to September, 1905, I was at Doucette, Texas; from that time until 1912, September, at Kirbyville, Texas. From that time, first of September, 1912, up until October, 1913, I was doing school and post-graduate work and from December, 1913, up to this time I have been in practice in Houston, Texas.

Q. 4. Have you in your practice used a pharmaceutical product known as Coco-Quinine, and if you have, whose product do you recognize it to be?

A. I have. I recognize it to be the product of Eli Lilly & Co.

Q. 5. How do you write your prescriptions for Coco-Quinine?

A. "Coco-Quinine."

Q. 6. When you write a prescription for Coco-Quinine, whose product do you intend to be used in filling such a prescription?

A. I recognize it as Eli Lilly & Company's.

Q. 7. Did you ever write a prescription for a product called Quin-Coco?

A. I have not.

Q. 8. Did you ever know of a cocoa or chocolate quinine preparation in the profession before Coco-Quinine was introduced by Eli Lilly & Co.?

A. Not that I remember.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 9. Do your patients receive their medicines from you through prescriptions chiefly or are they furnished directly to them by you?

A. I have had experience both ways in the past.

X Q. 10. Take your Texas practice other than in Houston,
248 what proportion of such medicines was furnished by you to patients through prescriptions and what proportion direct by you?

A. I could not say.

X Q. 11. Please approximate the proportions as nearly as you can, by percentages?

A. I can not give even an approximate estimate.

X Q. 12. Which method was commonest in your practice?

A. I could not answer that, because for seven years I was contract physician for the Kirby Lumber Company and at the same time carried on an extensive private practice. In my work for the Kirby Lumber Company medicines were dispensed by me direct to the patient from supplies furnished by the company. In my private practice medicines were furnished on prescriptions exclusively.

X Q. 13. When did you come to Houston to practice your profession?

A. December, 1913.

X Q. 14. In your Houston professional work, have your patients received their medicines through your prescriptions filled at drug stores, or direct from you?

A. Through prescriptions filled at drug stores.

X Q. 15. Is your practice large?

A. It is not. I have been here only a little over a year. It was large in the other places. It is entirely satisfactory to myself here.

X Q. 16. You say you have prescribed Coco-Quinine. Approximately to what extent?

A. I prescribed it over that period of time and found it a very useful preparation.

X Q. 17. From your experience and knowledge in Texas has there been a diminution of malaria and malarial diseases in the parts of the country where you have practiced your profession? I refer to the last five years.

By Mr. Bradford: Counsel for plaintiff gives notice to
249 counsel for defendant that he shall move to strike from the record all questions and answers not strictly cross-examination.

A. I can not say.

X Q. 18. Have you no opinion or belief on the subject, based upon your professional experience?

A. No definite opinion.

Cross-examination closed.

Deposition closed.

GEO. H. SPURLOCK.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILLIAM A. SCHAEFER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William A. Schaefer; age, 33; Houston, Texas; retail druggist; proprietor of Schaefer's Post Office Pharmacy.

Q. 2. How long have you been in the retail drug business and where?

A. About seventeen years; Cuero, Texas; and in Houston, Texas.

Q. 3. Please state whether or not during all of this period you have been in business as proprietor, or if not in what capacity?

A. I have been proprietor in Cuero up to 1908. I then came to Houston, and went to work for Heyer's Drug Store. I was
250 there until about 1910 and then went to Lewyn's Drug Store, and was there until 1912, when I opened up the Post Office Pharmacy and have been there three years.

Q. 4. During this period of experience as a retail druggist in various places have you handled a pharmaceutical product known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. I have. I recognize it to be Eli Lilly's product.

Q. 5. How is this product dispensed?

A. On prescriptions chiefly, and also on call over the counter, in the store's own bottles.

Q. 6. How are prescriptions for Coco-Quinine which you have seen, written by physicians?
A. Just "Coco-Quinine."
Q. 7. What does this mean to you as a druggist?
A. Lilly's Coco-Quinine.
Q. 8. Did you have any knowledge of any other cocoa quinine or chocolate quinine preparation before Coco-Quinine was introduced by Eli Lilly & Co.?
A. No, sir.
Q. 9. How long have you handled Coco-Quinine?
A. Since I started in the drug business.
Q. 10. Do you know anything about a product called Quin-Coco, and if so, what?
A. I know of such a product, a substitute for Coco-Quinine.
Q. 11. Whose product is it?
A. Searle & Hereth.
Q. 12. By whom is it sold?
A. The Pfeiffer Chemical Company of St. Louis.
Q. 13. By any other concern?
A. William R. Warner and Company, which is the same as the Pfeiffer Chemical Company.
Q. 14. Have you ever dispensed Quin-Coco and if so relate the circumstances?
A. I have, because I didn't have any other kind to dispense and was told that it was the same as Coco-Quinine.

251 By Mr. Rawle: I object because the action of the witness as stated by him can not affect the rights of the defendant and the question and answer are objected to as irrelevant and immaterial, and hearsay.

Q. 15. Was this on a prescription or on a call over the counter?
A. Both.

By Mr. Rawle: Same objection to question and answer.

Q. 16. More than once?

By Mr. Rawle: Same objection.

A. Yes.
Q. 17. How were the prescriptions written and which you filled with Quin-Coco?

Same objection.

A. "Coco-Quinine."
Q. 18. Was this when you were employed by another or when in your own store?

Same objection.

A. While employed by another.
Q. 19. Have you ever been solicited to purchase Quin-Coco?
A. I have.

Q. 20. On what representations were you asked to buy this product?

By Mr. Rawle: I object because the question does not connect the transaction with the defendant nor has the witness so connected it; because the question is improper, the only proper question being as to what was said.

A. It being Coco-Quinine, the same as Coco-Quinine.

Q. 21. Can you relate the conversation that occurred at
252 the time, or the substance of it, and if so will you please do so?

Objected to as no connection with the defendant has been shown.

A. I just stated that I didn't think it was fair to Eli Lilly to buy a substitute, the same as I would in buying a substitute for Horlick's malted milk, Welch's grape juice, or Coco-Cola.

Q. 22. You have stated what you said. What did the other man say?

By Mr. Rawle: Same objection.

A. That it was the same as Coco-Quinine, the same product.

Q. 23. Did he tell you that it could be used to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to for the same reason and as leading.

A. I presume he did, but he knew my position on substitution.

Q. 24. Who was the party who made these representations to you?

A. Mr. Gill. I don't know his initials.

Q. 25. What house or houses does Mr. Gill represent or did he represent at that time?

A. Pfeiffer Chemical Company and William R. Warner and Company.

Q. 26. Have you ever seen a prescription in all of your experience in the various places and stores where you have been, written for Quin-Coco?

A. I have not.

Q. 27. Have you ever had a customer over the counter call for Quin-Coco?

A. I have not.

Direct-examination closed.

253 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 28. What is your understanding of the word "substitute" as you use it? Does it mean something that can be used for another thing, or does it necessarily imply a dishonest use, by which a customer is deceived?

A. If a customer calls for an article, specifies the article, and is given something else it would necessarily mean substitution.

X Q. 29. Couldn't you handle a substitute for another original preparation and do it honestly as a druggist, always honestly explaining to the customer what he was getting?

A. You could if you practiced it.

X Q. 30. Then a perfectly honest druggist can carry in stock a substitute for an original preparation, and it is perfectly possible for him to sell it in an honest way, is it not?

A. I see no objection to a druggist stocking a substitute for a nationally advertised article, providing the customer is informed that he is not selling it as a substitute for what was really wanted.

X Q. 31. Then you think a perfectly honest druggist could carry what you call a substitute and sell it honestly and without deceiving customers. Is that correct?

By Mr. Bradford: This question and the others along the same line objected to as not cross-examination, as immaterial and irrelevant.

A. Well, my position with reference to substitutes is that they should not be sold on prescriptions, or over the counter.

X Q. 32. If you are filling a prescription and had run out of an ingredient called for by it, wouldn't you telephone the doctor and get his consent to substitute another ingredient for the one specified?

254 By Mr. Bradford: Question is objected to as a plain attempt of counsel for defendant to use witness for his own purposes, there being no justification for this or the preceding question in the direct-examination.

A. That would not constitute substitution then. I would call up the physician, if the drug specified was not obtainable.

X Q. 33. You have spoken of a "nationally advertised article" and I think you have spoken of an "original." By these terms do you mean substantially the same thing, that is, would a preparation like Coco-Cola in your mind be both a nationally advertised article and an original, in that field of beverages?

A. Yes.

X Q. 34. Is it your opinion that an original article is entitled to the business and that it is not fair for a druggist to dispense an article coming later on the market and having substantially the same qualities?

By Mr. Bradford: Objected to as immaterial.

A. I think it is unfair if sold as a substitute.

X Q. 35. Do you mean that it is unfair if the druggist passes off the later article for the original without telling the doctor or the customer?

A. Yes, sir.

X Q. 36. But it is not unfair if you inform the physician or the customer?

A. In my opinion it is not substitution then.

X Q. 37. You have testified that it was unfair for a druggist to put off an article on a doctor's prescription or on a customer without telling them. Do you mean that a perfectly honest druggist does not do that sort of thing?

A. I can't answer for other men there.

X Q. 38. Do you consider it honest?

A. I wouldn't do it.

X Q. 39. Please state exactly what was said by the salesman, Gill, to you and what you said to him, giving the words of both, just as they were spoken, and beginning with the beginning of the conversation?

A. I think that question has been asked before and has been answered.

X Q. 40. X Q. 39 repeated.

A. I don't recall the exact conversation, but it was represented the same as Lilly's Coco-Quinine.

X Q. 41. What else was said?

A. This is a matter of some three years and I could not recall the conversation exactly.

X Q. 42. I ask you to state if anything else was said, and what was said?

A. I simply told Mr. Gill that I did not care to stock Quin-Coco.

X Q. 43. Is that all you remember?

A. Except telling him that he knew my position on handling substitutes for the original.

X Q. 44. Was that all?

A. Yes, sir.

X Q. 45. Give the words in which you so stated to him what your position was as to handling substitutes?

A. I told him that the physician only knew one Coco-Quinine and that was Eli Lilly's.

X Q. 46. Is that all that you said?

A. I may have said more, but this is the substance.

X Q. 47. Do you wish to add anything else?

A. I do not except that I should like to have some dinner.

X Q. 48. You have said that you yourself would not pass off an article for the original on a doctor's prescription or on a customer without telling them, and you said in effect that you did not consider it the part of an honest druggist. That is correct, is it not?

A. Yes.

X Q. 49. Now what I want to know is whether Gill made you any dishonest proposition or asked you to do this dishonest thing?

A. I don't know that that would constitute dishonesty on the part of Mr. Gill.

X Q. 50. My question is whether Gill asked you to do a thing which you have just told us you consider dishonest in a druggist?

A. I would consider it dishonest if he told me to give them Quin-Coco instead of Coco-Quinine.

X Q. 51. What I am asking you is whether Gill asked you to do a dishonest thing?

A. He asked me to buy something that I did not want.

X Q. 52. When Gill called on you were you working for Lewyn?

A. I have known Gill for a number of years. I had no authority to buy at Lewyn's.

X Q. 53. Were you working for Lewyn at the time referred to in your answer to Q. 19, etc.?

A. That was not the only time he called on me. I have known him for many years; since I was in Cuero, in 1903. I know I bought goods from him there while I was with the Cuero Drug Company, I don't remember the year now.

X Q. 54. I have been asking you to state the language used in the conversation you had with Gill and you have testified as to that conversation. When was that conversation?

A. I do not recall.

X Q. 55. Can you give me any idea, whether it was three years or more than three years?

A. It was over three years. Gill has not been with the Pfeiffer Company for three years and a few months.

X Q. 56. Was it more than four years?

A. No, sir.

X Q. 57. Were you working for Lewyn then or were you in business for yourself?

A. I was working for Lewyn the last conversation I had with Mr. Gill.

257 X Q. 58. Was that the conversation you have been testifying to?

A. It was not.

X Q. 59. When was the conversation you have been testifying to?

A. Prior to that.

X Q. 60. How long prior?

A. I do not recall.

X Q. 61. As much as a year?

A. Yes, sir.

X Q. 62. Two years?

A. Say approximately four years ago.

X Q. 63. When you had that conversation were you in business for yourself and buying drugs for yourself?

A. I was not buying drugs for myself.

X Q. 64. Were you buying for Lewyn?

A. I was simply making out the order.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 65. At the time or times you furnished Quin-Coco for Coco-Quinine did you inform the physician or the customer and get their consent to do so?

By Mr. Rawle: I object because the matter called for is res inter alios acta and not relevant.

A. I did not, but was following instructions of my employer.

Deposition closed.

WM. A. SCHAEFER.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

258 BRYAN B. GILMER, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Bryan B. Gilmer; age 38; Houston, Texas; wholesale druggist. I am president of the Southern Drug Company.

Q. 2. What territory does your company serve?

A. Large part of Texas, part of Louisiana and a very small part of Mexico.

Q. 3. Do you handle a full line of pharmaceuticals and drug products?

A. Yes, sir; such as is ordinarily stock by a well equipped wholesale drug house.

Q. 4. The products of all the leading manufacturers?

A. Not of all the leading manufacturers, but of most of the leading manufacturers.

Q. 5. Does your house handle a pharmaceutical preparation known as Coco-Quinine and if so, whose product do you recognize it to be?

A. We do. It is the product of Eli Lilly & Co.

Q. 6. How long have you handled this product, and is there much demand for it in your trade?

A. We have handled it since the beginning of our business, some eight or nine years ago. There is a large demand for it.

Q. 7. Throughout the entire territory served by your store?

A. Yes, sir.

Q. 8. Have you ever received an order so far as you know for a product called Quin-Coco?

259 A. To the best of my knowledge and belief we have not.

Direct examination closed.

No cross-examination.

Deposition closed.

BRYAN B. GILMER.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Recess until 2:30 o'clock.

After Recess.

2:30 o'clock.

WILLIAM O. SCHULER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. William O. Schuler; age 37; Houston, Texas; city salesman for the National Biscuit Company.
Q. 2. Have you ever purchased a medicine or pharmaceutical product known as Coco-Quinine?
A. Yes, sir; I bought this bottle from the Hardy Street Drug Store today.

The witness here hands counsel a bottle labeled "Coco-Quinine (Shake) Hardy Street Drug Store R. H. Fonville, Prop. 2102 Hardy St. Both Phones. Houston, Texas."

Q. 3. Are you sure that this is the identical bottle and contents that you personally bought of this store?
260 A. Positive, yes, sir; because I have had it in my possession ever since I bought it.

By Mr. Bradford: The bottle in question is offered in evidence and marked "Complainant's Exhibit Houston Sample."

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 4. How did you happen to buy it?
A. At the request of a friend of mine, Mr. W. L. Griffin.

Mr. Rawle: The testimony of the witness and the exhibit are objected to as inter alios acta and as not binding on the defendant, and as irrelevant and immaterial.
Plaintiff's counsel agrees that the objection may have the same force and effect as though made in direct-examination.

Cross-examination closed.

Deposition closed. WILLIAM O. SCHULER.

Subscribed and sworn to before me this 3rd day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

WALTER L. GRIFFIN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

261 A. Walter L. Griffin; age 35; Houston, Texas; traveling salesman representing Eli Lilly & Company.

Q. 2. What territory do you cover for Eli Lilly & Co., Mr. Griffin?

A. I cover the territory adjacent to Houston, including the town of Houston, representing about eight counties, I think, eight or ten. I mean the territory which runs south to the Gulf, northeast to Timpson, Texas, and all the territory east and south of Timpson to the Louisiana line.

Q. 3. Please explain your duties in your position?

A. My duties are saleswork and detail work. I mean by saleswork soliciting orders for the products of our manufacture from the retail and wholesale trade also from physician. By detail work I mean visiting physicians and endeavoring to interest them in the products of our manufacture.

Q. 4. What do you know or what can you tell us relative to the product known as Coco-Quinine?

A. I know Coco-Quinine is a palatable preparation of quinine sulphate, manufactured by Eli Lilly & Co., and enjoys a large sale in my territory.

Q. 5. Do you know anything concerning a product called Quin-Coco, and if so, what?

A. I know that Quin-Coco is a product that is sold very extensively in my territory and is used instead of Coco-Quinine. In a great many instances I know it to be used as a substitute for Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay, and as not connecting any transaction with the defendant.

Q. 6. By whom is Quin-Coco sold?

A. By the William R. Warner Company of Philadelphia and St. Louis, I believe.

Q. 7. How do you know that Quin-Coco is used in any instances as a substitute for Coco-Quinine?

262 By Mr. Rawle: Objected to as irrelevant and immaterial, and because no ground is laid for connecting any transaction with the defendant.

A. Well, I have seen it dispensed in a good many instances when Coco-Quinine was ordered.

Q. 8. How did you happen to see these transactions?

Same objection.

A. By simply being on hand when the sale was made, at a druggist's store.

Q. 9. Can you tell us anything more definite relative to such instances or such transactions?

A. I have witnessed instances where a customer asked for Coco-Quinine and have seen the druggist dispense Quin-Coco from the original package of the Warner & Company product, in Houston.

One instance that I have in mind is at Mr. R. H. Fonville's drug store.

By Mr. Rawle: The answer is objected to because it is vague and does not state the facts constituting the transaction.

Q. 10. Have you ever seen prescriptions written for Coco-Quinine and seen them filled with Quin-Coco?

By Mr. Rawle: The question is objected to as calling for transactions between third parties which do not bind the defendant and as irrelevant and immaterial.

A. I have, yes, but I would not be able to give you any specific time. I have seen them in numbers of instances, but specific times and places I would not be able to give you.

Q. 11. Have you seen quantities of the product called Quin-Coco in drug stores in your territory?

A. Yes, sir; large quantities in some instances.

Q. 12. By R. H. Fonville's drug store do you mean the Hardy Street Drug Store, R. H. Fonville, Proprietor, No. 2102 Hardy St., Houston, Texas?

Same objection.

263 A. Yes, sir.

Q. 13. State anything further that you can in reference to these transactions that you have seen at Mr. Fonville's store and what you have said to him about them, if anything?

By Mr. Rawle: Same objection and because what the witness has said to any one is hardly evidence to bind the defendant.

A. I can just state that I have observed Mr. Fonville when he was dispensing a bottle of the product Quin-Coco to a customer who had asked for Coco-Quinine and Mr. Fonville remarked "Here goes a bottle of good Coco-Quinine." I have seen as high as three unopened gallon packages of Quin-Coco in Mr. Fonville's store at a time. Mr. Fonville has voluntarily stated frequently that he supplied it regularly on a demand for Coco-Quinine.

By Mr. Rawle: The answer is further objected to as hearsay.

Q. 14. Has Mr. Fonville, to your knowledge, any of the Lilly product, Coco-Quinine, in his store?

A. I am quite positive he has not.

Q. 15. Have you made any recent investigation to find out?

By Mr. Rawle: Same objection.

A. I examined his stock today and am quite positive that he has none in stock at the present time.

Q. 16. How long has it been since you sold him any Coco-Quinine?

By Mr. Rawle: Same objections.

A. I haven't sold him any Coco-Quinine within a year or two, I

can't remember when I did sell him any, not within the last two years.

Q. 17. Are such conditions relative to the Coco-Quinine trade, as you have described as prevailing at Mr. Fonville's store
264 found in other drug stores in your territory?

By Mr. Rawle: The question is objected to as calling for matter between third parties and not binding on the defendant, as irrelevant and immaterial, and as asking the witness to state the prevalent conditions, instead of asking him to state facts known to him to exist, which might or might not constitute those conditions.

A. A great many other drug stores, yes, sir.

Direct-examination closed.

By Mr. Rawle: The entire deposition beginning with Q. 5 is again objected to for the reasons above stated.

No cross-examination.

Deposition closed.

WALTER L. GRIFFIN.

Subscribed and sworn to before me this 3rd day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at 7.35 p. m., this day, in Drawing Room A, Car 11, Train No. 8, East Bound, Southern Pacific, Houston to New Orleans.

Houston, Texas—On train No. 8
en route Houston to New Orleans,
April 3, 1915—7.25 p. m.

Met pursuant to adjournment.

Parties present as before.

265 JULIUS R. PROCHNOW, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Julius R. Prochnow; age 34; San Antonio, Texas; retail druggist; I am a member of the firm of Prochnow & Donnell.

Q. 2. Do you know of the product known to the trade as Coco-Quinine and if so what can you tell us about it?

A. Yes, I know about it; it is mostly prescribed by physicians and occasionally called for over the counter. It is the product of Eli Lilly & Co.

Q. 3. Do you have a considerable call for it at your store in San Antonio?

A. Yes, sir; it is called for frequently and we have a good many prescriptions for it.

Q. 4. How are the prescriptions written?

A. "Coco-Quinine, Lilly." Sometimes only "Coco-Quinine."

Q. 5. When a prescription is received written only for "Coco-Quinine", whose product do you understand is intended by the physician?

A. Eli Lilly's.

Q. 6. Do you know of any other similar product that was on the market before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No, sir.

Q. 7. How do customers call for Coco-Quinine when they ask for it over the counter?

A. "Coco-Quinine."

Q. 8. How long have you been in the retail drug business?

A. About thirteen years.

265 Q. 9. Does your store do a large prescription business in San Antonio?

A. Not very large.

Q. 10. How does it compare with other drug stores?

A. Just about the same as other outlying drug stores, that is, suburban drug stores.

Q. 11. Have you ever received a prescription or a call for Quin-Coco?

A. No, sir.

Q. 12. Have you ever been solicited to buy Quin-Coco and if so by whom and what inducements were held out as a reason for such a purchase?

By Mr. Rawle: Objected to as the witness should be asked only what was said.

A. Yes, William R. Warner & Company's salesman solicited my order and the inducement was the price.

Q. 13. What else was said by William R. Warner & Company's salesman?

A. He told me that it was the same preparation as Coco-Quinine and I was foolish for paying more money for it, as his was a good deal cheaper.

Q. 14. Did he say anything about what use you could make of it?

By Mr. Rawle: Objected to as leading.

A. He intended me to use it instead of Coco-Quinine.

By Mr. Rawle: The answer is objected to as not stating what the salesman said.

Q. 15. What do you mean by "instead of Coco-Quinine"?

Same objection as to the last question and as not calling for testimony as to what was said.

A. When I got a call for Coco-Quinine or a prescription, that it could be used instead.

Q. 16. When was this? Or about when?

267 A. Some time ago, I don't remember when, probably three months.

Q. 17. What was the name of the salesman if you remember?

A. His name was Richards, I think, I don't know his initials. It has also been offered to me by a man named Gill, but that has been longer ago. He used to make that territory before Mr. Richards.

Q. 18. Did Gill represent the same house?

A. Yes, sir.

Q. 19. Did he offer it to you on the same representations?

By Mr. Rawle: Objected to as leading and as not asking for what was said.

A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 20. Tell me just where you were standing when Richards called on you some three months ago?

A. Back of the prescription counter.

X Q. 21. What did he first say to you about your buying Quin-Coco? Give his exact language in the very way that he said it?

A. Well, he told me that—he asked me whether I was using much Coco-Quinine, if I did he could save me some money on it. He said that he had Quin-Coco which was the same thing as Coco-Quinine and he then gave me the different prices between Coco-Quinine and Quin-Coco.

X Q. 22. Do you mean that he didn't say any more than what you have just stated to me?

A. He went on and talked about other preparations.

X Q. 23. What I want to know is if you have now stated in answer to my questions the conversation which took place between

268 you and Richards on the subject of Coco-Quinine and Quin-Coco?

A. I have given it to you.

X Q. 24. How long ago did Gill call on you?

A. That has been—I don't remember how long ago that has been—but it has been probably two years I am guessing at that.

X Q. 25. It might have been four?

A. No, not that long. Between two and three years.

X Q. 26. Were you in your store?

A. Yes, sir.

X Q. 27. Did you buy from him at that time?

A. I bought some once, but I don't know whether that was Richards or Gill.

X Q. 28. State just what Gill said to you when he asked you to

buy Quin-Coco. Give his language in the way he used it and what you said just as you said it?

A. Gill said that I would be very foolish for paying the price for Coco-Quinine, that he had an identical preparation and he named the prices, which I don't remember, I don't remember prices.

X Q. 29. Anything else?

A. That is all; just about that price and that preparation.

X Q. 30. I understand then that you have now stated in answer to my questions all that Gill said to you about buying Quin-Coco. Is that right?

By Mr. Bradford: Objected to as an improper question in an equity proceeding?

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 31. Did Mr. Gill say anything to you about using Quin-Coco to supply the demand for Coco-Quinine, and if he did, what did he say on this subject?

269 By Mr. Rawle: Objected to as leading. Also because the witness has been fully examined in chief and in cross-examination and the question is improper for re-direct.

A. Well, after leaving me under the impression as I stated before, on the difference in the price and the product being the same, that I was very foolish to keep on using the Coco-Quinine at a higher price.

By Mr. Rawle: Mr. Rawle here states that the question was at this point re-read to the witness.

After leaving me under the impression that the preparations were similar, were the same, that I was very foolish to supply the demand with the high priced preparation.

R. D. Q. 32. Did Mr. Richards say anything to you on this same subject, and if so, what did he say, if you remember?

By Mr. Rawle: Objected to as leading, as the witness has already been fully examined by counsel on the subject and as improper re-direct.

A. He represented the preparation to be the same as Coco-Quinine, only, if I remember right, he was not as insistent as Mr. Gill in his efforts to sell.

R. D. Q. 33. I believe you have testified that you have never had any demand for Quin-Coco. If you had no demand for Quin-Coco how did Mr. Richards or Mr. Gill justify soliciting your order for it?

By Mr. Rawle: Objected to as improper, irrelevant and immaterial, and because it does not call for a statement of what was said at the interview with Richards but calls for a justification and as argumentative.

A. They knew there was a demand for Coco-Quinine, and
270 claimed to have a similar preparation or a preparation that in every way resembled it, and intended for the same purpose, so far as color and taste are concerned.

R. D. Q. 34. What has the demand for Coco-Quinine to do with this matter?

By Mr. Rawle: Objected to as improper redirect-examination, as irrelevant and immaterial and because the witness has already been fully examined.

A. What matter?

R. D. Q. 35. With the sale of Quin-Coco?

A. I suppose that William R. Warner & Co. were making money out of their preparation. That is evidently what they made it for.

R. D. Q. 36. You don't seem to understand my question. Will you please state why, if you know, the demand for Coco-Quinine should control or influence the sale of Quin-Coco?

By Mr. Rawle: Objected to as tending to lead the witness; because the witness has already been fully examined in chief; as not redirect-examination.

By Mr. Bradford: I will withdraw the question and put it in a different way.

R. D. Q. 37. In your judgment would there be any sale for Quin-Coco if Coco-Quinine was not in demand?

By Mr. Rawle: Objected to as irrelevant and immaterial, because the witness has already been examined in chief and this is not proper re-direct-examination, and as immaterial and irrelevant.

A. I don't think so.

Re-direct-examination closed.

271 Recross-examination.

By Mr. Rawle:

R. X Q. 38. Don't you think William R. Warner & Co. had a right to offer for sale any preparation which they think to be a good medicine, even if it does compete with another like preparation on the market?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I don't know about that. They may have a right to offer it for sale, but I don't know about it.

Deposition closed. J. R. PROCHNOW.

Subscribed and sworn to before me this 3rd day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

FRED A. BURNS, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Fred A. Burns; age 43; San Antonio, Texas; traveling man for Eli Lilly & Co.
Q. 2. What territory do you cover?
A. San Antonio territory. Part of Southwest Texas.
Q. 3. Do you handle the full line of Eli Lilly & Co. products?
A. Yes, sir.
Q. 4. What can you tell us about the demand for their product known as Coco-Quinine in your territory?
272 A. There is a large demand for it.
Q. 5. How long have you been selling it?
A. Since 1904.
Q. 6. Has the demand been continuous?
A. Yes, sir.
Q. 7. Please state from whom you solicit orders?
A. From the retail druggists. I also detail physicians. The reason I did not say at first "sell physicians" is because there are very few physicians in my territory who dispense. They are mostly prescription writers. The orders I take are filled through the jobbers.
Q. 8. What do you know if anything concerning a product called Quin-Coco?
A. I know that it is sold in my territory. It is sold through William R. Warner & Co., bearing the Searle & Hereth label.
Q. 9. How is it sold and to whom?
A. It is sold to the retail druggists and to anybody who will buy it.
Q. 10. By whom?
A. By the salesmen of William R. Warner & Co.
Q. 11. How do you know that this product is sold to retail druggists in your territory?
A. Because I have seen it on the shelves of retail druggists and I have seen invoices of it from William R. Warner & Co.

Direct-examination closed.

No cross-examination.

Deposition closed.

FRED A. BURNS.

Subscribed and sworn to before me this 3rd day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at St. Charles Hotel, New Orleans, La., Monday, April 5, 1915, at 9 a. m.

273 New Orleans, La.,
St. Charles Hotel, April 5, 1915—9 a. m.

Met pursuant to adjournment at the St. Charles Hotel, New Orleans, La.

Parties present as before.

HOWARD S. SMITH, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Howard S. Smith; age 34; Crowley, La.; traveling salesman for the Finlay-Disks & Co., wholesale druggists, of New Orleans, La.
Q. 2. Do you canvas the retail trade for this house?
A. Yes.
Q. 3. In what territory?
A. Southern Pacific Railroad from New Orleans to Beaumont, Texas, and adjacent territory.
Q. 4. Do you know a Mr. B. F. Jones, traveling salesman for William R. Warner & Co.?
A. I do.
Q. 5. I understand from Mr. C. Broussard that you know something about his sales of a product called Quin-Coco, or at least concerning an instance of such sale. Will you please relate anything you may know of this subject?
A. I suppose that you refer to a conversation that took place between Mr. Jones and Broussard at Houma, La., in my presence. Mr.
274 Broussard and myself were sitting in the hotel at Houma when Mr. Jones came in and Mr. Broussard asked him how business was. He replied "Pretty good." I just sold five gallons"—I don't recall whether he said "I have just sold" or "have sold"—"five gallons of Coco-Quinine." Mr. Broussard replied, "No, you haven't sold any Coco-Quinine," and Mr. Jones replied, "Well, Quin-Coco, what's the difference."

Direct-examination closed.

By Mr. Rawle: The answer is objected to as irrelevant and immaterial and as stating no fact which can affect the rights of the defendant.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 6. I should like to know when this incident occurred?

A. Why, I couldn't give the exact date without being at Houma and seeing on the hotel register when we were there. It was the early part of this year, though.

X Q. 7. At that meeting between the three persons named, had you just been talking about Coco-Quinine, or had the words been mentioned?

A. We had not.

X Q. 8. What had you been talking about?

A. Mr. Jones had just walked into the hotel when this conversation took place. I don't recall just what Broussard and myself had been discussing at the time.

Cross-examination closed.

Deposition closed.

HOWARD S. SMITH.

Subscribed and sworn to before me this 5th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

275 CHARLES H. PORTER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Charles H. Porter; age 35; Henning, Tenn.; retail druggist, under the name of R. S. Porter & Co., but I am the proprietor.

Q. 2. Please tell us if you handle a pharmaceutical preparation known as Coco-Quinine, and, if you do, whose product it is?

A. Yes; we handle Coco-Quinine, made by Eli Lilly & Co.

Q. 3. How long have you handled this preparation?

A. Ever since it was put on the market, probably about fifteen years.

Q. 4. Did you know of any other cocoa or chocolate quinine preparation before Coco-Quinine was introduced by Eli Lilly & Co.?

A. I did not.

Q. 5. How do you dispense Coco-Quinine at your store?

A. We dispense Coco-Quinine on physicians' prescriptions and on call when customers ask for it by that name over the counter.

Q. 6. What preparation, I mean the preparation of what manufacture, do you always understand is meant when "Coco-Quinine" is written on the prescription or called for by a customer?

A. The preparation of Eli Lilly & Co.

Q. 7. Have you ever received a prescription written for "Quin-Coco" at your store?

A. I have not and I have never had a call for "Quin-Coco" over the counter.

Q. 8. Have you ever been solicited to purchase Quin-Coco,
276 and if you have, will you relate the circumstances?

A. I have. Some five or six years ago when Warner & Co. first put this on the market I was asked to buy Quin-Coco by Mr. Kelton, their representative, he telling me that it was the identical formulæ of Lilly's Coco-Quinine, and could be used as a substitute. He further told me that practically all of the druggists were using it in place of Coco-Quinine, and when Coco-Quinine was called for.

By Mr. Rawle: The answer is objected to as stating only inferences and not what was said.

Q. 9. Did you purchase Quin-Coco of Warner & Company's salesman, and if so, what use have you made of it?

By Mr. Rawle: The second clause is objected to as irrelevant and immaterial.

A. I did. I have sold it as chocolate quinine. We have educated them up to call for chocolate quinine believing it to be the identical preparation as Coco-Quinine, relying upon the statement of Mr. Kelton, before referred to. We have some times sold the Quin-Coco when they called for Coco-Quinine, believing it was the identical thing.

By Mr. Rawle: The last part of the answer is objected to as irrelevant and not binding on the defendant.

Q. 10. What product do you regard as intended by a customer when such customer asks for "chocolate quinine"?

A. I would judge that they wanted Coco-Quinine, because I have never had a call for Quin-Coco.

Q. 11. How do you justify the furnishing of Quin-Coco in filling orders where "Chocolate quinine" is specified?

277 By Mr. Rawle: Objected to as immaterial and irrelevant and as not binding on the defendant.

A. Relying on the statement of Mr. Kelton that it was the identical formulæ of Lilly's Coco-Quinine.

Q. 12. You state that you have educated your customers to ask for "chocolate quinine." By what methods?

A. Well, they used to call for "Coco-Quinine," and I would say "You want the chocolate quinine for children," and they would say "Yes," and I would give them Quin-Coco.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

XQ. 13. About when did you have that conversation with Kelton?

A. It has been six or seven years ago. I am sure it was about

the time it was put on the market because he had been calling on me before and had never offered it to me for sale.

X Q. 14. Had you bought his preparations before then?

A. Yes.

X Q. 15. Rather frequently?

A. Kelton and I were great friends and I think I always gave him an order. Occasionally I might have missed him.

X Q. 16. Won't you please state exactly the words he used in offering to sell you Quin-Coco at the time you refer to? State just what he said and just what you said in direct form?

A. I can't repeat his exact words, but I remember that he said he had something new for me. I asked him what it was and he said "Quin-Coco, an identical preparation as Coco-Quinine,
278 and could be used and sold and dispensed as such." He further said a majority of his trade were using it in place of Coco-Quinine.

X Q. 17. I understood you to say that it was a new product. What then would you mean by a majority of his trade?

A. I suppose he was taking orders for it and they were going to use it in place of Coco-Quinine. I know at one time he showed me an order from several of the Dyersburg druggists for a quantity shipment.

X Q. 18. By asking you to state directly just what Kelton said to you and what you said to him, I mean to ask you to give his words and your words in the direct form. For instance you say that he said he had something new for me. Do you mean that his words were "I have something new for you?"

By Mr. Bradford: Objected to as immaterial.

A. I understood that he meant that he had something new for the trade.

X Q. 19. In what words did he express the thought, was it in the words "I have something new for you?" I don't care what impression he made on you. What I want to know and the court will want to know is what words did he use in attempting to convey some impression to your mind?

By Mr. Bradford: The question is objected to as immaterial and incompetent in assuming to state what the court will want to know, or implying that the court will have any interest whatever in the exact words used, so long as the witness testifies to the facts to the best of his recollection and belief.

A. "I have something new for you."

X Q. 20. Give in direct words, if you will, the words that you used in reply, just as you used them?

By Mr. Bradford: Objected to as immaterial.

279 A. As best I can remember I suppose I used the words "What is it," as every salesman, practically every salesman, that has a new article on the market usually addresses you by saying "I have something new for you."

X Q. 21. Now that you understand that what I want is what Kelton said and what you said, expressed in the direct form, will you not go ahead and give in direct form the rest of the conversation, as far as it related to the new product?

By Mr. Bradford: Objection repeated.

A. I have already stated that he told me it was the exact same formulae as Coco-Quinine. I do not rememeber whether I bought any of this article when it was first offered to me or not. And I can't remember what was the exact words said.

X Q. 22. After he said that, what else did he say?

By Mr. Bradford: Objected to not only as immaterial but unreasonable in view of the witness's previous answers.

A. I don't remember. I don't know that we even talked further on the subject.

X Q. 23. And then, or afterwards, you bought some of his Quin-Coco, did you?

A. Either then or afterwards, I did.

X Q. 24. Please state, in the exact words used, by each of you at any subsequent conversation, if there was any subsequent conversation on this subject?

A. When he would make his regular trips he would ask me how was my stock of Quin-Coco. He would always inquire as to how was my stock of Quin-Coco. And I presume that I told him if I had plenty, and if I was short, I bought it.

X Q. 25. Were you a friend of Kelton's and for how long?

A. From the time he first called on me until the time he
280 was discharged. However no more friendly relations existed between Kelton and I than does between their present representative, Mr. Du Vall and myself.

X Q. 26. I am sure that you consider yourself an honest druggist, and I need hardly ask the question?

A. I do.

X Q. 27. And you knew Kelton pretty well. Did you consider him an honest man?

A. I never knew a straighter man in business dealings than Mr. Kelton.

X Q. 28. Now I want to ask you whether Mr. Kelton in his talk in selling you Quin-Coco made any dishonest suggestions to you? Be kind enough to answer Yes or No, and then you can make any explanations afterwards.

A. He told me it could be substituted for Coco-Quinine. If it is the exact formulae of Coco-Quinine, as stated by Mr. Kelton, then I do not consider that he misrepresented it to me.

X Q. 29. What do you understand by "substitution" or "substituted?" Do they imply dishonesty on the part of the druggist?

A. Not necessarily. If an article is identically the same in every respect, no matter who it is made by, I would not consider that I was substituting, as far as what is contained in the article. But I am sorry to say that I have used some of Quin-Coco and given it to

my trade sometimes when I feel sure that they wanted Coco-Quinine. But relying on the statement of Mr. Kelton with what I consider an honorable house behind him, I felt justified in doing it. But believing that Eli Lilly & Co. are really entitled to the sales of this article I will sell no other but Coco-Quinine in the future.

X Q. 30. Then you regret having sold Quin-Coco for Coco-Quinine, do you?

281 A. Yes, I do.

X Q. 31. And you regard Kelton, you said, as an honest man?

A. I do.

X Q. 32. Do you regard your present position as more highly moral than the position you took when you sold Quin-Coco for Coco-Quinine, is that correct?

A. I do. The article may be just as good as Coco-Quinine, but if they want Coco-Quinine I intend to give it to them.

X Q. 33. That is all right. But what I now want to know if you feel sure that Kelton was suggesting to you to do something, which you have now concluded was not quite the square thing to do? How would such conduct on his part be consistent with the respect which you say you have for Kelton as a straight man.

A. I believe that Mr. Kelton believed Quin-Coco to be identical as Coco-Quinine.

X Q. 34. If Kelton was an honest man, in your opinion, do you say that he suggested to you that you should palm off or pass off on unsuspecting customers, Quin-Coco in place of Coco-Quinine when they called for Coco-Quinine?

A. I do not believe Mr. Kelton would have suggested using any article in his belief not just as good or a better article, and I am sure that I would not have sold Quin-Coco to the trade had I not believed it was an identical preparation as Coco-Quinine.

X Q. 35. You do not quite answer my question. I will repeat it. (X Q. 34 repeated.)

A. He did do it, but I believe with—He told me that it could be used as a substitute for Coco-Quinine.

X Q. 36. Please give his exact words in telling you that?

A. I have already stated several times that he stated that it was the identical formulae of Coco-Quinine ,and I believe he was honest in thinking so.

282 X Q. 37. Do you consider it as dishonest in a druggist or not dishonest to palm off or pass off an identical preparation in place of the other preparation when called for without informing the customer as to what he is getting?

A. If the preparation is identical it may not be dishonest, but it is not right.

X Q. 38. Then what I am trying to get at is whether the honest salesman, Kelton, made you a suggestion that you should buy his Quin-Coco and use it in a way that was not right in you as a druggist?

A. He made the suggestions that I have already stated. We all

do things at times that might seem to be all right, but after more serious thought find it is not exactly right and just.

X Q. 39. I assume that Kelton may have had the same regard for you as a straight man that you had for him. Is it not possible that in offering you Quin-Coco to take the place of Coco-Quinine he meant that you could in a perfectly straight way dispense it, letting the customer know that he was getting Quin-Coco?

A. I don't know what he thought about it, but I know that it hasn't been sold for Quin-Coco.

X Q. 40. You have not answered my last question. I will ask you to do so?

By Mr. Bradford: The question is objected to as the witness's answer was fully responsive to the question.

A. I hardly think Mr. Kelton expected me to tell every customer that called for Coco-Quinine that it wasn't Coco-Quinine, but was Quin-Coco.

X Q. 41. How long since you have sold Quin-Coco?

A. I am selling it now.

X Q. 42. How was your attention called to the thought that your method of selling Quin-Coco was not quite right, as you have expressed yourself?

A. Well, after thinking over the matter seriously it having
283 been offered to me as a substitute for Coco-Quinine, and realizing that Lilly was the first to get this on the market, and has gone to the expense of advertising this article to the physicians, I feel that they are justly entitled to the demand they have made for it.

X Q. 43. When did you think it over with this result?

A. In the last ten days. I thought of it more seriously in the last ten days. When Mr. Winchester, the representative of Eli Lilly & Co., telling me that this proceeding had been started and asked me to testify in Memphis, I tried every way to keep out of this and after thinking over the matter seriously I have come to this conclusion, that it is not the right thing to do, that is, to sell Quin-Coco for Coco-Quinine.

X Q. 44. When Winchester talked to you about this did he know what you had been doing in selling Quin-Coco?

A. I don't know that he did. He has seen both articles in my store, we keep both on hand. He might have. I don't know whether he did or not.

X Q. 45. I mean did Winchester know your methods in selling Quin-Coco, which methods you have testified were not quite right, or did you tell him about your methods?

A. I am not sure but I don't think I ever went over this matter with Winchester. I am sure that he knew that I was selling about five gallons of Quin-Coco to one gallon of Coco-Quinine.

X Q. 46. In your opinion as an honest druggist, is there any reason why a later product which is identical with an earlier product, should not be sold on its merits, provided that the customer is not

deceived and that he knows whether he gets the earlier product or the later product as the case may be? I refer now to pharmaceutical specialties.

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

284 A. There is no reason that they should not be if it is identical, but it should be sold for just what it is.

X Q. 47. Will you tell me if the only instance known to the drug business of identical drugs or preparations is the instance of Coco-Quinine and Quin-Coco?

By Mr. Bradford: Objected to as wholly immaterial, irrelevant and incompetent and not cross-examination.

A. No, there are other similar preparations, as far as the formulæ is concerned. I can say Quin-Coco is the only substitute that we carry in our store.

X Q. 48. Is it not extremely common in your business to handle or to be offered similar preparations?

By Mr. Bradford: Objection repeated and notice is given that plaintiff will not undertake to furnish defendant either witnesses or time to introduce into the record opinions on such irrelevant subjects.

A. Do you mean similar to Coco-Quinine and Quin-Coco, or do you mean to other pharmaceuticals?

X Q. 49. Are there not hundreds of cases or very many cases, where, if you wish to carry a certain drug, preparation, or specialty, you could find on the market more than one such drug, preparation or specialty which was similar to or perhaps identical? Is that not the case?

By Mr. Bradford: Objection and notice repeated.

A. Yes, I understand that some houses, as soon as a reputable house gets out some article, some houses will at once try to put on a similar article at a cheaper price.

X Q. 50. Mention any similar or identical preparation, drugs or specialties which you carry in stock?

By Mr. Bradford: Objection and notice repeated.

285 A. Well, take Syrup of White Pine Compound; most all houses make Syrup of White Pine Compound. Of course those things are made up, and many other things are made up according to the U. S. P. and would have to be identical.

You might say Elixir of Iron, Quinine and Strychnine, U. S. P. All of those would have to be identical to come up to U. S. P. When a pharmaceutical house, as I understand it, puts up a new preparation similar to the one put up by some other house, they show this to the physicians and submit to them their formulæ, but each house may have an entirely different name and when prescribed would be pre-

scribed by the special formulæ that the doctor wants and I will add that that is different from Coco-Quinine because other articles are practically all prescribed through the physician and Coco-Quinine is as commonly sold and called for in a drug store as salts or other similar articles.

X Q. 51. As the result of all this examination and consideration I come now to the final question, do you consider that your friend, Kelton, made you a dishonest suggestion to buy Quin-Coco and palm it off on your customers for Coco-Quinine when called for? I ask you to answer Yes or No.

By Mr. Bradford: The question is objected to as the witness has answered this question fully on several occasions.

A. I don't consider that he meant this dishonestly.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 52. I understood you to say that your feelings toward the Warner house were friendly and that you are a regular patron of said house. Is this correct?

A. This is correct.

286 R. D. Q. 53. I also understand that you are in doubt as to whether you made your first purchase of Quin-Coco at the time Kelton made his first introduction of the subject to you, or at another time. Was the representations he made at the first interview made at the time you made your first purchase, whether it was then or later?

A. Yes, he recommended it until I made the first purchase as being the same.

R. D. Q. 54. Was anything said about the price?

A. He recommended that I should handle it because it was the identical formulæ and cheaper in price.

Deposition closed.

C. H. PORTER.

Subscribed and sworn to before me this 5th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EDMUND F. BARNES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edmund F. Barnes; age 28; McComb City, Miss.; retail drug-

gist; I am one of the stockholders of the McComb City Drug Store. I am President of the corporation and Mr. E. C. Ellzey is Secretary and he and I together run the store.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine at your store?

A. We do.

287 Q. 3. Whose product do you recognize it to be?

A. Eli Lilly & Company.

Q. 4. How long have you handled this preparation?

A. Ever since I have been in the drug business, about ten years.

Q. 5. Do you have considerable demand for it?

A. Yes, we have a regular sale for it, a continuous sale.

Q. 6. How do you dispense it?

A. On prescriptions and when asked for by customers, at the counter.

Q. 7. In your own containers or bottles?

A. I pour it out in bottles and put my own labels on it.

Q. 8. Have you ever had a prescription for Quin-Coco at your store?

A. No, sir.

Q. 9. Have you ever had a customer ask for Quin-Coco at your store?

A. No, sir.

Q. 10. Have you ever been solicited to buy Quin-Coco, and if so, by whom and what were the reasons advanced why you should purchase it by the party offering it?

A. Quin-Coco has been offered us by Mr. Gonzales the salesman and representative of Warner & Co.

He offered it to be used as a substitute for Coco-Quinine and said that it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quinine without any one being the wiser.

Q. 11. Has Mr. Gonzales offered you Quin-Coco on more than one occasion, and if so, when was the first occasion if you remember?

A. I don't remember the exact dates, but he has been in our territory since January of last year, January, 1914, and he calls on us about every sixty or ninety days, and at each time he offers Quin-Coco.

288 Q. 12. Did you ever purchase any Quin-Coco of Mr. Gonzales or the house he represents?

A. No, sir.

Q. 13. Why did you not buy it?

By Mr. Rawle: Objected to as irrelevant.

A. I didn't think I could sell it to my customers because they don't know about it, and I couldn't dispense it because I didn't get prescriptions for it.

Q. 14. Did he say anything to you about the cost of it, the price?

A. He did, but I have forgotten what he said. He told me that

it was cheaper than Coco-Quinine, but just what the difference was I don't remember.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 15. Please give the exact words of Gonzales when he offered you Quin-Coco as you have testified?

A. He said "How is your stock of Coco-Quinine, why don't you buy our Quin-Coco. It is the same formulae and the only chocolate quinine on the market that can be disposed for Coco-Quinine without any one being the wiser. Besides it is cheaper."

X Q. 16. When he said this to you did he know that you were a druggist that was in the habit of substituting one drug for another or one preparation for another?

By Mr. Bradford: Objected to as improper and immaterial.

A. If he knows that he knows more than anybody else. I don't substitute.

X Q. 17. Then are you not in the habit of substituting one preparation for another without informing the parties?

259 A. I don't quite understand how to answer your question.

X Q. 18. When a customer calls for one preparation, are you in the habit of selling him another preparation without informing them?

A. No, sir.

X Q. 19. Would you consider it honest in a druggist to do so?

A. No, sir.

X Q. 20. And if I should accuse you of that sort of practice, you would resent it, wouldn't you?

A. I would.

X Q. 21. Did Gonzales suggest that sort of practice to you on Quin-Coco?

A. He offered Quin-Coco to be used as Coco-Quinine.

X Q. 22. Meaning that you should dishonestly use Quin-Coco for Coco-Quinine, and pass it off on your customers without telling them?

A. He suggested that I buy Quin-Coco and dispense it for Coco-Quinine, but there was nothing said of dishonesty.

X Q. 23. Then you didn't think that he was suggesting any dishonest course to you?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. He suggested that I use it as Coco-Quinine but there was nothing said of dishonesty.

X Q. 24. Did you understand him as suggesting to you that you should dishonestly dispense it as Coco-Quinine?

By Mr. Bradford: Objection repeated.

A. I did.

X Q. 25. Did you resent it and tell him so?

By Mr. Bradford: Same objection.

290 A. I told him that I never substituted.

X Q. 26. Do you swear that you told him you never substituted?

By Mr. Bradford: Same objection.

A. I do.

X Q. 27. Did you afterwards buy anything from him on that day? Or had you previously on that day bought anything from him?

A. I had not bought anything from him on that day, and haven't bought anything from him since.

X Q. 28. You testified that Gonzales suggested that you buy Quin-Coco and dispense it for Coco-Quinine. Please state precisely the exact words in which you can swear that he made such a suggestion to you?

By Mr. Bradford: Objected to as improper and immaterial.

A. I answered that once. I will repeat it though, if you wish me to. He asked me "how was my stock of Coco-Quinine," and asked me why I didn't buy Quin-Coco, and told me that it was the only chocolate quinine on the market that could be dispensed for Lilly's Coco-Quinine without any one being the wiser, and that it was cheaper.

X Q. 29. Do you swear that you distinctly and clearly remember that Gonzales spoke these exact words; namely:

"This is the only chocolate quinine on the market that can be dispensed for Lilly's Coco-Quinine, without anybody being the wiser."

A. I do, with the addition of the suggestion that it was cheaper, after he had asked how my stock of Coco-Quinine was.

X Q. 30. And in spite of this you didn't order him out of your store, did you?

A. No, sir.

X Q. 31. Are you in the habit of letting people in your store make dishonest suggestions to you, without ordering them out of
291 the store or taking some action like that?

By Mr. Bradford: Objected to as wholly immaterial, irrelevant and incompetent.

A. This is the only instance that I can recall and I only told him that I didn't substitute.

X Q. 32. Would it be dishonest in your opinion when a customer calls for Coco-Quinine to advise him to take Quin-Coco and thus make the sale?

By Mr. Bradford: Objected to as incompetent, not being cross-examination and as wholly irrelevant and immaterial.

A. No, sir. If I told the customer at the time that it was a good preparation.

X Q. 33. Then isn't it fair to give Gonzales the benefit of the doubt and to believe that that was the way he meant you to sell Quin-Coco for Coco-Quinine? I mean do it honestly.

By Mr. Bradford: Objected to as incompetent, this being a question for the court to decide and not the witness, and as irrelevant and immaterial.

A. Gonzales offered Quin-Coco to be dispensed on prescriptions, as well as to be sold over the counter as Coco-Quinine. In the case of a customer asking for Coco-Quinine we could honestly dispense Quin-Coco with the consent of the customer after having mentioned its merits, but in the case of a prescription it would be dishonest, without the physician changing the prescription to Quin-Coco.

X Q. 34. And that is what Gonzales suggested to you to do, wasn't it?

By Mr. Bradford: Objected to as an improper question. The witness having answered fully what Gonzales suggested.

292 A. No, sir.

X Q. 35. I repeat X Q. 33.

A. No, sir.

X Q. 36. Give the exact words in which he offered Quin-Coco to be dispensed on prescriptions.

By Mr. Bradford: Objected to as an unjustified repetition of questions; also as immaterial and irrelevant.

A. He asked "How is your stock of Coco-Quinine," and asked "Why don't you buy our Quin-Coco, it is the only chocolate quinine on the market that can be dispensed for Coco-Quinine without any one being the wiser."

X Q. 37. Is that all?

A. And besides that it is cheaper?

X Q. 38. Is that all?

A. He might have said something else but I don't just recall what it was. We didn't close our conversation right at that time.

X Q. 39. You have just testified two or three times that Gonzales said to you that Quin-Coco could be dispensed for Coco-Quinine, without any one being the wiser.

In answer to X Q. 33 you testified that "Gonzales offered Quin-Coco to be dispensed on prescriptions." How do you explain the difference between these two statements and which is correct?

By Mr. Bradford: Objected to on the ground that there is no difference between the two statements, as counsel well knows.

By Mr. Rawle: Mr. Rawle requests opposing counsel so far as he

can, to make objections in such form that they will not be suggestive to the witness.

By Mr. Bradford: Mr. Bradford requests opposing counsel to interrogate the witness in such form as to develop facts and not otherwise.

293 A. He meant on prescriptions written for Coco-Quinine originally.

X Q. 40. What did he say?

By Mr. Bradford: Objected to as having been answered several times.

A. He said it was the only preparation of chocolate quinine on the market that could be dispensed for Coco-Quinine.

X Q. 41. And you now stick to it that that is what he said on that part of the subject?

A. Yes, sir.

Cross-examination closed.

Deposition closed.

E. F. BARNES.

Subscribed and sworn to before me this 5th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Tuesday, April 6, 1915, at same place, St. Charles Hotel, New Orleans, La., at 9 a. m.

New Orleans, La.,
St. Charles Hotel, April 6, 1915—9 a. m.

Met pursuant to adjournment, at St. Charles Hotel.

Parties present as before.

CHARLES C. BROUSSARD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

294 By Mr. Bradford:

Q. 1. Are you the same Charles C. Broussard who has already testified in this cause?

A. I am.

Q. 2. Do you recall any conversation at any time between yourself and Mr. B. F. Jones, traveling salesman for William R. Warner & Co., in the presence of Mr. Howard S. Smith? If you do will you please relate what was said at the conversation, where it took place, and any other circumstances in reference thereto, that may be of interest.

A. I remember a conversation that took place in Houma, La., be-

tween Mr. Jones and myself in the presence of Mr. Smith, in which Mr. Jones remarked that he had sold five gallons of Coco-Quinine the day previous. I told Mr. Jones that he hadn't sold any Coco-Quinine at all, as he didn't have it for sale. And he answered that he meant Quin-Coco which was the same thing.

Q. 3. When was this conversation as near as you can remember?

A. As near as I can remember it was sometime last fall.

Direct-examination closed.

Cross-examination.

By Mr. Rawle, without waiving the prior objections nor the notice to strike out, following Q. 12 of the witness's examination in chief:

X Q. 4. What was the name of the druggist as to which I questioned you in X Q. 13? Are you ready to give the name now?

By Mr. Bradford: I object to this question as improper, the witness having stated a good reason in answer to X Q. 21 of his previous examination for declining to give the name of the party re-
295 ferred to. Counsel for plaintiff will not ask any witness to disregard a promise even though the information sought may be of great value to plaintiff's case. He does not think that it is fair or would be an honorable thing to do. He here promises counsel for defendant however that he will make a diligent effort by other means to obtain the name of the party in question and also to produce said party as a witness in this cause. Up to this time he has been unable himself to obtain the name of said party, and is as ignorant thereof as counsel for defendant. There is no desire, as previously stated, to keep the name of said party from the knowledge of opposing counsel, and the question which gave rise to the present situation was asked without any previous knowledge that witness was not at liberty to answer.

The question is further objected to as clearly not cross-examination at this time.

A. No, sir, I am not ready to give the name, for the same reason given in my previous testimony.

By Mr. Rawle: Mr. Rawle repeats the notice to strike out and not waiving the same cross-examines as follows:

X Q. 5. What were you three doing at the time you have told us about?

A. If you have reference to the conversation between Mr. Jones and myself in the presence of Mr. Smith, we were in the lobby of the Commercial Hotel at Houma, Louisiana, discussing business.

X Q. 6. Just happened to meet there casually?

A. Yes, sir. We were all stopping at the same hotel.

X Q. 7. What had you been talking about when this conversation ensued which you have testified to?

A. Well, we were talking about business conditions in gen-

296 eral, and Mr. Jones always has the habit of telling just how much business he does, and I suppose he just wanted to let us know that he sold that much Quin-Coco that day, or the day previous.

X Q. 8. Were you having a very serious business talk, or was a light and pleasant and perhaps jesting talk, such as I observe is very common among salesmen I have been associating with in the last three weeks?

A. There wasn't any jesting about the matter. We were simply talking about the general condition of business throughout the territory when he mentioned this.

X Q. 9. It was a dead serious talk, was it?

A. Well, it was as serious as any business talk could be, I suppose.

X Q. 10. And Jones in speaking of his sales accidentally used the name Coco-Quinine for the name Quin-Coco, did he?

A. I can't say whether it was accidentally or not, but he mentioned just the facts as I have stated.

X Q. 11. Have you noticed, or do you know, that all through these depositions counsel in referring to either of these products have got the names mixed on the record, so that the Examiner has had to correct them?

A. No, sir, I did not notice.

X Q. 12. Is it not possible that Jones simply, as we say, misspoke, and accidentally used the wrong name for his product, which he said he had sold?

By Mr. Bradford: Objected to as incompetent.

A. Mr. Jones certainly ought to know the name of his own product.

X Q. 13. Please repeat the words of the conversation?

A. I have already—well, Mr. Smith of the Finlay-Dicks and Company and myself were in the lobby of the Commercial Hotel, at Houma, La., where we met Mr. Jones, who represents the William R. Warner & Company, and in speaking about general busi-
297 ness conditions throughout the territory, Mr. Jones mentioned the fact that he had sold five gallons of Coco-Quinine the day previous and I answered him that he hadn't sold any Coco-Quinine at all as he didn't have any for sale. He replied that he meant Quin-Coco which was the same thing.

X Q. 14. Are you aware that your version and the version given by Howard S. Smith differ?

A. No, sir, I do not know what Mr. Smith testified to.

X Q. 15. Please answer X Q. 13, of your first examination.

A. I cannot answer, for the same reasons stated in my previous testimony.

Mr. Rawle repeats the notice to strike out the entire deposition.

Cross-examination closed.

Deposition closed.

C. BROUSSARD.

Subscribed and sworn to before me this 6th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

MAX SAMSON, witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.
A. Max Samson; age, 54; New Orleans, La.; Proprietor
298 of Max Samson's Retail Drug Store, at No. 117 Camp St., New Orleans, La.
Q. 2. Do you do a large prescription business?
A. Yes.
Q. 3. Are you familiar with a pharmaceutical product known as Coco-Quinine?
A. I am.
Q. 4. Do you receive prescriptions for it?
A. Occasionally.
Q. 5. How long have you handled this product?
A. About ten years.
Q. 6. Whose product do you recognize it to be?
A. Eli Lily & Company's.
Q. 7. Do you also sell it to customers over the counter?
A. Yes, sir.
Q. 8. Has the demand for this product been a continuous one at your store since you began handling it?
A. It has, a slight demand but nothing very large.
Q. 9. Do you receive prescriptions from physicians all over the city?
A. Yes, my business is scattered all over the city.
Q. 10. Have you ever received a prescription written for Quin-Coco?
A. I can't recall it to mind.
Q. 11. Have you ever received a call from a customer for Quin-Coco?
A. I can't remember that either.
Q. 12. Would you be likely to know if there were calls, prescriptions for Quin-Coco at your store?
A. Yes.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 13. During how many hours of the average time your store is open, are you present dispensing drugs?
299 A. Probably eight. I am present that time, but I

simply supervise. The store is open from 7 a. m. until 10 p. m.

X Q. 14. Do customers ever call for a chocolate quinine preparation?

A. People have called for a chooclate quinine preparation and Eli Lilly's is the only one we have, which we have sold on these calls.

X Q. 15. When customers seem to want a chocolate quinine preparation, do they usually ask for it in that way or do they specify the exact trade name of a preparation of that sort? Which is most common?

A. At my store I have a more intelligent class of patrons I imagine than in the majority of stores located in a residential district and they seem to know what they want and the majority of them ask for the preparation under its proper name.

X Q. 16. Do a considerable minority ask for it as "chocolate quinine" or similar words, but not specifying the precise trade name?

A. The majority of them ask for it under the trade name although we have had calls for a chocolate quinine preparation.

X Q. 17. Your answers are never responsive to my questions. Please state whether or not a considerable minority of your customers, wishing to purchase a chocolate quinine preparation call for it by such words or words of like import but without giving the precise trade name of the product they desire?

A. A very considerable minority.

X Q. 18. Do such minority ever use other names than chocolate quinine, such as "sweet quinine," or "tasteless quinine," or "syrup of quinine?"

A. Yes.

X Q. 19. All of them or any of them?

A. A considerable majority of the minority.

X Q. 20. If that is so, how can you swear that not a single
300 one of them has in his mind and means to purchase Quin-Coco?

A. I never made any such oath, I never said that.

X Q. 21. May they not so have intended?

A. Or implied.

X Q. 22. You mean that they might have so intended, do you?

A. I can't read a man's mind, sir.

X Q. 23. In such case do you ask him what kind of chocolate preparation or tasteless quinine, or syrup of quinine, or sweet quinine they wish to purchase?

A. It depends upon the way the customer asks for it.

X Q. 24. Please explain.

A. Well, we have a syrup of quinine, known as the syrup of amorphus quinine, and the same comes in liquid and in powder, and we endeavor to give our patrons what they ask for. We may go into detail when there is any doubt as to what they really want.

X Q. 25. If the customer asks specifically for a "chocolate quinine" preparation, without saying anything more what do you give them?

A. On one or two occasions I endeavored to make a preparation of my own, but it did not reach my expectations, and having the Lilly preparation on our shelves we found it more convenient to dispense that.

X Q. 26. When a customer calls for a "chocolate quinine" preparation, I understand you to say that you feel it to be legitimate and proper to make a preparation of your own and dispense it. Is that correct?

A. Yes, where no specifications are made.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 27. Did you know of any chocolate quinine preparation on the market prior to the time Coco-Quinine was introduced
301 to the profession by Eli Lilly & Co., of Indianapolis?

A. If I did I have forgotten it.

R. D. Q. 28. Who do you consider has created the demand for a syrup of quinine preparation flavored and colored with chocolate?

By Mr. Rawle: I object to the question as irrelevant and immaterial, and because the witness is not qualified to give the information inquired about.

A. I don't know. If you want my experience, my opinion, I only know of the Eli Lilly preparation.

Recross-examination, without waiving objections.

By Mr. Rawle:

R. X Q. 29. In your thirty years of experience in the drug business have you never before Lilly's Coco-Quinine came out, known of the sweetening of a bitter dose of quinine by flavoring it with chocolate?

A. Yes. You ask me if masking the bitter taste of quinine. In my experience we used a salt of quinine with chocolate in the form of a lozenger. This salt was known as a tannate of quinine and was not very bitter, in fact very slightly bitter.

R. X Q. 30. When was this?

A. About twenty years ago.

R. X Q. 31. Was it common and what period did it cover, to your knowledge?

A. Two years positively.

R. X Q. 32. Can you remember any other preparation of cinchona or any derivative with chocolate, the latter being used to mask the taste?

A. Not as being sold, only experimentally.

R. X Q. 33. That seems to me to be rather strange. Has not

chocolate during all your experience been commonly used as a flavoring?

302 A. Flavoring for what?

R. X Q. 34. For pharmaceutical preparations mask an objectionable taste in any given drug?

A. Very, very little.

Re-cross-examination closed.

Deposition closed.

MAX SAMSON.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

LUCIEN E. LYONS, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Lucien E. Lyons; age, 57; New Orleans; Wholesale Druggist. I am of the firm of I. L. Lyons & Co., Ltd., Wholesale Druggists, and we have a Retail Department.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?

A. We do. It is the product of Eli Lilly & Co.

Q. 3. Do you handle it in both your jobbing and retail departments?

A. In both.

Q. 4. Does this product enjoy a considerable demand from the retail drug trade and also from the customers and patrons of your retail drug store?

A. To the best of my knowledge it has.

Q. 5. How long has your house been handling this product, if you can state?

303 A. Between ten and twelve years, we didn't handle the line in the beginning.

Q. 6. How long have you been in the drug business?

A. About thirty-two years.

Q. 7. Did you know of any quinine preparation in syrup form, colored and flavored with chocolate, prior to the time Coco-Quinine was introduced by Eli Lilly & Co.?

A. I think not.

Q. 8. Have you ever had a demand or a call for a preparation called Quin-Coco?

A. Of my personal knowledge, no, but I have been informed by one of our pricers that there have been possibly two or three calls for it.

By Mr. Rawle: The last clause is objected to as hearsay.

Q. 9. Has there ever been any demand for it in your retail store either by prescriptions or by customers?

A. To the best of my knowledge, no.

Q. 10. Did you make an inquiry or investigation to ascertain this fact, before coming here?

By Mr. Rawle: Objected to as calling for hearsay.

A. I did.

Q. 11. Whose product do you understand to be intended when Coco-Quinine is called for, without any other specification?

A. Eli Lilly's.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 12. I take it that you have not, for some years at least, had to do with the minor details of the business?

304 A. That is a difficult question to answer, because I am the detail man of the house, I am in every department.

X Q. 13. Do you ever have a demand for chocolate quinine liquid preparation?

A. To the best of my knowledge, no.

X Q. 14. Neither in the wholesale or retail branch of your concern?

A. To the best of my knowledge, no. Upon inquiry I found that we had two orders for the Warner preparation and ordered the goods and supplied them about a year ago.

By Mr. Rawle: Answer is objected to as hearsay.

X Q. 15. In the retail branch are you willing to state that customers have not called for a liquid chocolate quinine preparation, without specifying the exact trade name thereof?

A. No, sir, I couldn't say that.

X Q. 16. Then in what you have said above you have been speaking of the wholesale?

A. No, I have been speaking of the business in general.

X Q. 17. Do you intend it to be your testimony that neither in your wholesale nor in your retail business have you ever had, say, in the last two years, more than two or three calls for a liquid chocolate quinine preparation without specifying the maker?

A. To the best of my knowledge, I do.

X Q. 18. How much of every day for the last fifteen years have you spent in the retail department in such a way as to enable you to know of your own knowledge exactly what customers are calling for?

A. I am in and out of the department, in fact all departments of the house, all during the day, and generally supervising the work.

X Q. 19. Is the entire business in the same building?

305 A. Yes, sir, the retail department is on the same floor as the office.

X Q. 20. Is the retail department an ordinary dispensing drug store?

A. Yes, sir.

X Q. 21. During what hours of the day is it open?

A. From 7 a. m. until 10 at night.

X Q. 22. How many of those fifteen hours do you spend in the retail drug store in such a way that you could know exactly what all the customers are calling for?

A. I hardly know how to answer that question because I don't wait on customers, but very seldom, but reports are given to me of everything that is required to have in the retail store, and then I order the goods accordingly.

X Q. 23. I think my last question is capable of a more specific answer.

A. I answered to the best of my ability that I don't wait on the customers. I am in there possibly twenty times a day and possibly more supervising the business.

X Q. 24. Does this include the evenings after say, five o'clock?

A. Occasionally, and also Sundays.

X Q. 25. Would your going in and out of the retail drug store aggregate two hours a day on the average?

A. That I couldn't answer.

X Q. 26. Are there not many or at least some products of a pharmaceutical kind which enjoy a large sale to retail druggists, which you do not carry in stock, or do not have any call for?

A. Possibly.

X Q. 27. Can you mention any instance?

A. Not in this section, if it has any sale.

X Q. 28. Do you carry in stock Dr. Hobson's Toothache Drops?

306 By Mr. Bradford: Objected to as not cross-examination and as immaterial and irrelevant.

A. Well, I don't trust my memory for everything. We have got over four thousand maybe five thousand patent medicines in our store, and I certainly can not enumerate them all.

X Q. 29. What is your best recollection as to Dr. Hobson's toothache drops?

A. I believe we do carry it, the name is familiar.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 30. What territory does your jobbing department serve?

A. Louisiana, Mississippi, part of Alabama, Florida, lower part of Arkansas, Central America, the Islands.

Deposition closed. LUCIEN E. LYONS.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

FRANK AUSTIN FITCH, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Frank Austin Fitch; age 42; New Orleans, La.; sales
307 manager for Parker-Blake Company, wholesale druggists.

Q. 2. Does your store handle a product known as Coco-Quinine, and if so whose product do you recognize it to be?

A. We handle Coco-Quinine. It is manufactured by Eli Lilly & Co., of Indianapolis.

Q. 3. What territory does your house serve?

A. Louisiana, Mississippi, part of Florida, part of Southern Alabama and the eastern part of Texas.

Q. 4. Do you have a considerable demand for this product throughout this entire territory?

A. We do.

Q. 5. How long have you been handling this product?

A. Ever since the Parker-Blake Company have been in business. We have been in business eleven years. I had better be more specific and testify since my connection with the Parker-Blake Company, six years last March past. I know we have handled it all that time.

Q. 6. How are the orders for Coco-Quinine received from your trade, I mean how is the product specified usually?

A. Usually as "Coco-Quinine." Occasionally Lilly's or frequently "Lilly's."

Q. 10. When the orders are for "Coco-Quinine," without "Lilly's" being specified, whose product do you understand is intended?

A. On all orders for "Coco-Quinine," we assume and know that the customer wants "Coco-Quinine, Lilly's."

Q. 11. Have you ever received an order at your store for a product called "Quin-Coco"?

A. Not that I can recall.

Q. 12. Would such an order if received since you have been in charge of your present department, likely come to your notice?

308 A. It would pass through my hands going and coming.

Cross-examination.

By Mr. Rawle:

XQ. 13. Do you have orders for chocolate quinine not specifying the name of the preparation, or the maker?

A. Not that I recall. They are usually "Coco-Quinine".

X Q. 14. Has your concern any retail stores?

A. We may own an interest in some retail store by a matter of credit, to such an extent that we virtually own it.

X Q. 15. How many?

A. One store.

X Q. 16. Where?

A. The Owl Drug Store, Jennings, La.

Cross-examination closed.

Deposition closed. FRANK AUSTIN FITCH.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

RALPH G. PERSELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Ralph G. Persell; age 33; New Orleans, La.; sales manager for Finlay-Dicks & Company, Ltd., wholesale druggists.

309 Q. 2. What territory does your house serve?

A. We cover the entire State of Louisiana, the lower three-quarters of the State of Mississippi, Eastern Alabama, and we have representatives in Tampa, Florida, and Beaumont, Texas.

Q. 3. Do you handle a pharmaceutical preparation known as Coco-Quinine and if you do, whose product is it?

A. We handle Coco-Quinine, made by Eli Lilly & Co., of Indianapolis.

Q. 4. How long has your house been handling this product, if you know?

A. We have been handling it ever since it has been on the market.

Q. 5. Are the demands for Coco-Quinine general throughout the territory covered by your house, and is the demand small or considerable?

A. The demand is considerable. In fact I might say that Coco-Quinine is on two out of every three orders that come into our house.

Q. 6. Have you ever received an order calling for Quin-Coco, since you have been sales manager for your house?

A. Not a single order.

Q. 7. Would you know if such an order had been received?

A. I would.

Q. 8. Do you know anything in reference to the product referred to, called Quin-Coco, and if so, what can you tell us?

A. Previous to my becoming sales manager of Finlay-Dicks & Co., I was ten years a traveling drug salesman and Quin-Coco is generally known in the territory that I covered as a repeater or substitute for Lilly's Coco-Quinine.

Q. 9. Have you ever seen this product in the retail stores while you were traveling salesman?

A. Yes, in some instances.

510 Q. 10. Have you any further information on which you base your statement that it is known as a substitute for Lilly's Coco-Quinine?

By Mr. Rawle: The question and the last answer is objected to as hearsay or calling for hearsay and as irrelevant.

A. No other than Warner's representative, Mr. Jones, with whom I traveled, has told me that it was the same thing as Lilly's Coco-Quinine.

Director-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 11. How long have you been connected with this house in your present position?

A. Two years last October.

X Q. 12. Where were you before and what were you?

A. I was traveling salesman for the Parker-Blake Company of this city.

X Q. 13. What are your duties as sales manager for the present house?

A. To look after the entire sales organization and price all the orders from the country territory and Central American.

X Q. 14. Do you mean that you are at the head of the selling department?

A. Yes, exactly.

X Q. 15. Do you travel very much?

A. Very seldom, I make a tour of inspection about once a year around the territory.

X Q. 16. Whom do you visit or see on such yearly trips?

A. I meet our representatives in various territory and call on the large trade in a few of the best towns covered by each man.

X Q. 17. How many separate items of drugs or pharma-
511 ceutical preparations do you carry in stock, approximately?

A. No human could approximate the different items that we carry. So far as I am concerned I could not approximate them because the drug business is one of a multitudinous small items.

X Q. 18. Give your best approximate, whether it be one or ten thousand or any figure between?

A. I could not say with any degree of accuracy.

X Q. 19. Do you handle during the year as many as five thousand items?

A. Yes, we handle that many and probably a great many more.

X Q. 20. Ten thousand?

A. As I stated, I could not say with any degree of accuracy just how many.

X Q. 21. More than seventy-five hundred or less?

By Mr. Bradford: The question is objected to as useless repetition and unnecessary padding of the record.

A. As stated, I could not say with any degree of accuracy.

X Q. 22. Are you not familiar with your company's stock?

A. Yes, in every detail.

X Q. 23. Do you publish any catalogues showing all your items or substantially all carried in stock?

By Mr. Bradford: Objected to as absolutely immaterial and irrelevant.

A. We publish a catalogue, listing items generally known in this market as "staples," for which we have steady demand. We carry in stock thousands of items which are necessary to have a complete stock, calls for which we have only occasionally, and it would entail an expense and be altogether useless to list these items in our catalogue.

312 X Q. 24. Do you consider that you carry a complete stock?

By Mr. Bradford: Objection repeated.

A. We carry a complete stock of items that are regularly in demand in this section.

X Q. 25. Approximately to how many drug stores or doctors who dispense medicines do you sell in the course of a year?

A. I can not state positively, but it is my impression and I think it is about correct, that our ledgers carry about ten thousand names.

X Q. 26. And you say that two out of every three orders you receive include an item for Coco-Quinine. Is that correct?

A. This statement might not be exactly correct, but the item in question appears on the majority of our orders, as the demand in the territory which we cover is pretty general.

X Q. 27. Then you would like to modify your former statement that two out of every three orders include an item of Coco-Quinine, would you?

A. To the effect of my last statement.

X Q. 28. Why did you so greatly exaggerate the subject in your first answer?

A. I do not admit that I exaggerated, but handling all the orders that I do, and knowing that we supplied it on so many orders, I would judge that our output would conform to the last statement made.

X Q. 29. You say you have ten thousand customers on your ledgers? Do they average approximately ten orders each and every year?

A. Well, I couldn't say that. Some of them we only get one order a year from. Not every account is active. Some are inactive.

X Q. 30. Perhaps some of the ten thousand names on your ledgers are those of drug stores to whom you have ceased to sell on account of credit or the like. Is that probable?

313 A. Altogether. These accounts though are sometimes brought into line and become active accounts.

X Q. 31. About how often is each salesman expected to call on each customer or possible customer?

By Mr. Bradford: Objected to as not cross-examination and as irrelevant and immaterial.

A. Some weekly, some two-weekly, some monthly, some every ninety days.

X Q. 32. State approximately how many orders you receive during the year?

A. Without reference to our books I couldn't tell.

X Q. 33. Do you receive as many as fifty thousand a year?

A. I don't know.

X Q. 34. Do you receive as many as twenty-five thousand a year?

A. If I knew I would have answered you in the first place.

X Q. 35. Do you receive as many as twelve thousand a year?

A. Same answer.

X Q. 36. Do you receive as many as six thousand a year?

A. Same answer.

X Q. 37. You are under oath and are legally bound to answer all proper questions put to you unless an answer to a question would incriminate you. I now ask you to state your opinion or your belief, rather, as to whether your house receives during the year more than twenty-four thousand separate orders for pharmaceutical preparations?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant. And further because the witness has already stated that he don't know the number of orders received.

314 A. I am answering your questions to the best of my knowledge and belief and so stating I could not say accurately how many orders we receive.

X Q. 38. Please state your "belief" as to whether your house during a year receives more than twenty-four thousand separate orders for pharmaceutical preparations?

By Mr. Bradford: Objection repeated.

A. I don't know positively.

X Q. 39. Have you any belief on this subject?

A. I can not go on record as I don't know.

X Q. 40. (Question repeated.)

A. I don't know. I can't tell.

X Q. 41. By the word "substitute" which you have used, do you mean a pharmaceutical preparation which is identical with or similar to another and perhaps earlier preparation on the market, in respect of its medicinal effect?

A. As to many preparations on the market under patent names put out by various concerns there are similar preparations which are supposed to be and in many cases accepted as the same formulæ. This in the parlance of the trade is known as "replacers."

X Q. 42. Are they also known as "substitutes"?

A. "Substitutes" and "replacers" are synonomous.

X Q. 43. And you have now fully answered X Q. 41?

A. This is the best answer that I can give to that question, as I understand it.

X Q. 44. Do you handle "Pill Cascara Cathartic" (Hinkle). I am asking this question in order to make clear your definition just given.

A. Yes, we handle this preparation. I really don't know the originator of it.

X Q. 45. Do you buy it from William R. Warner & Co., of Philadelphia?

A. No, we don't handle Warner's pills generally. But if we had an order for that particular brand we would get it for our customers.

315 X Q. 46. You know the pill, don't you?

A. In a general way only. I know what it is.

X Q. 47. I mean do you know it as an article of commerce?

A. Yes, we handle it.

X Q. 48. Do you know a Lilly & Co., product called "Pill Cascara Compound, Hinkle"?

A. Yes, we handle it.

X Q. 49. Do you understand that these two products are of the same formulæ?

A. I know that it is an "open" formulæ, but I have never compared the Lilly formulæ with the Warner formulæ.

X Q. 50. Have you any doubt that they have the same formulæ?

A. I do not know, having never compared them.

X Q. 51. In order to clear up your definition of "substitute" or "replacer," please assume that the two pills which I have just mentioned, Warner and Lilly, have the same formulæ, and that the Warner pill was originally put out by Warner & Co. Would the Lilly pill come within your definition of a substitute upon those assumptions?

A. They are put out under the same name and if I mistake not are listed by other pharmaceutical concerns. When a preparation has an "open" formulæ and is listed by various manufacturers it is generally accepted as a regular pharmaceutical and not a specialty, as it can be purchased under the same name from various manufacturers.

By Mr. Bradford: No objection has been made to this line of clearly improper examination, for the reason that complainant does not desire to be put in the attitude of objecting to any of its acts being disclosed in the record. Counsel for defendant, however, is now requested to confine his cross-examination to what is legitimately cross-examination and has some relevancy to the issues involved in this suit.

316 By Mr. Rawle: Defendant's counsel refers to Q. 8 where the witness used the words "repeater" or "substitute," and states that he is cross-examining in order to develop what the witness means by those words.

Mr. Bradford: Mr. Bradford replies that the alleged cross-examination speaks for itself.

X Q. 52. Please answer X Q. 51.

A. I answered that question.

X Q. 53. Don't you know that the two pills I have named are not put out under the same name by Warner and Lilly respectively?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. I know that Lilly puts out a pill "Hinkle," and while I am not as familiar with Warner's pharmaceuticals as I am with Lilly's, I am almost certain that Warner puts out a pill "Hinkle" also.

X Q. 54. Question repeated.

By Mr. Bradford: Objection repeated.

A. Same answer; that's all I can say.

X Q. 55. I now ask you to answer X Q. 51.

A. I have answered that question to the best of my ability already.

X Q. 56. Do you use the word "substitute" in respect to a given preparation, without regard to whether druggists handling it dispense it honestly or dispense it by way of palming it off in place of a preceding and earlier preparation on the market to which it is similar or with which it is more or less identical?

A. When a preparation with a given name is in demand and supplied, no substitution takes place. But if this preparation is asked for and a similar preparation under a different name is supplied then this is what we understand as a "substitution."

317 X Q. 57. You have now switched over to the word "substitution." What I am asking you about is whether you place a certain limitation or not upon the word "substitute"? I put it this way. If a given preparation had been on the market for ten years prior to this year, and a similar preparation were offered by another house, would you call it a "substitute" in the language of your business?

A. If the name was identical and supplied as ordered it would not be a substitute.

X Q. 58. I repeat the last question and ask you to answer yes or no as the question is perfectly capable of such an answer.

By Mr. Bradford: Mr. Bradford advises the witness that he is privileged to answer counsel's questions as may seem to him proper and is not necessarily confined to a yes or a no, although where such an answer suits the witness it is advisable to use it.

A. I have answered that question, I think, to the best of my ability.

X Q. 59. Why can't you answer it yes or no?

A. I have answered the question by explanation.

X Q. 60. If I pointed out an animal on the street and asked you if that was a horse or not, could you answer yes or no?

A. Certainly.

X Q. 61. If a given preparation had been on the market for ten years prior to this year, and this year a similar preparation were offered by another house, would you apply the word "substitute" to the latter, in the language of your business? Please reply without regard to whether the trade names of the two preparations were identical or otherwise, but assume only that they were similar and that one had been on the market some time prior to the other.

A. In our business if preparations have the same name and we receive an order we are at liberty to supply either one and
318 it would not be regarded as a substitute. For instance we receive an order for "Simmons Liver Regulator." We are at liberty to supply "M. A. Simmons Liver Regulator," or "Zehlin's Simmons Regulator."

X Q. 62. Can you tell me why you cannot answer or will not answer X Q. 61 yes or no? You can explain your answer afterwards, if you choose. I am only asking you whether your definition of "substitute" covers the given case or instance set forth in my question?

A. Substitution is supplying one thing for another. When a preparation has identically the same name it is optional with us to supply either preparation.

X Q. 63. How is it when they have different names?

A. When they have different names we supply what is ordered.

X Q. 64. I ask you to define a "substitute" or rather to say whether your definition of it extends to a given case set forth in X Q. 61. You have answered by defining "substitutions." Is it possible for you to say whether the word "substitute" is used in the trade to cover the later of two pharmaceutical preparations which are identical or similar but put on the market under a different trade name.

A. It makes no difference when they were put on the market. If their names are the same you are, as I have stated, at liberty to supply either one.

X Q. 65. But if their names are different, what then?

A. If their names are different you can't supply something that you haven't got.

X Q. 66. But suppose you have got both in stock?

A. Then we would supply what was ordered. If we should supply a different preparation from the one ordered we would be substituting.

X Q. 67. If a given pharmaceutical preparation had been on the market for five years and a similar or identical preparation under a different name, were put out by another house, would it
319 be proper to speak of the latter as a "substitute" for the former, and might you not use the word "substitute" in that way, entirely without regard to dishonest substitution by a druggist or drug concern?

A. Any preparation that purports to be the same as another preparation we recognize as a substitute.

X Q. 68. And speak of it as such?

A. Yes.

X Q. 69. Have you ever had any calls in the two and a half years for a "chocolate" quinine syrup or a "chocolate" quinine liquid preparation?

A. Our calls are for "Coco-Quinine."

X Q. 70. Invariably?

A. I am certain that all of our orders are for "Coco-Quinine."

X Q. 71. Of course they all come from the trade?

A. Yes, sir.

Cross-examination closed.

Deposition closed. RALPH G. PERSELL.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Recess until 2.30.

After Recess.

CHARLES HENO, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

320 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Charles Heno; age 37; Napoleonville, La.; retail druggist.

Q. 2. How long have you been in the retail drug business?

A. Some nineteen years.

Q. 3. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if you do whose product is it?

A. I do. It is the product of Eli Lilly & Co.

Q. 4. When did you first begin handling Coco-Quinine?

A. Ever since the product was made, perhaps. Ten years or more.

Q. 5. Had you known of any cocoa or chocolate quinine preparation prior to the introduction of Coco-Quinine by Eli Lilly & Co.?

A. No, sir.

Q. 6. How is Coco-Quinine dispensed at your store?

A. Principally prescriptions, and sometimes on call over the counter, in my own prescription bottles.

Q. 7. How do your physicians write their prescriptions for "Coco-Quinine"?

A. They generally write "Coco-Quinine" and sometimes they specify "Coco-Quinine, Lilly."

Q. 8. When you receive a prescription written for "Coco-Quinine" without the manufacturer's name, whose product do you understand the physician intends?

A. Lilly's.

Q. 9. Is this product Coco-Quinine, prescribed by the physicians in your neighborhood generally and continuously or only occasionally?

A. It is pretty generally and continually. It is a good way of giving quinine to children.

Q. 10. Have you ever received a prescription written for "Quin-Coco"?

321 A. No, sir.

Q. 11. Have you ever had a customer ask for Quin-Coco over the counter?

A. No, sir.

Q. 12. Do you know anything about the preparation called Quin-Coco and if so tell us what you know in reference thereto?

A. All I know is that three or four years ago a representative, I think it was a Mr. Jones, sold me one gallon of Quin-Coco, telling me at the time that it was a cheaper preparation from a financial standpoint then Coco-Quinine, and that physicians were using it all over for Coco-Quinine. I bought a gallon and used perhaps three pints and was stopped by one of my physicians because it did not receive the required results or anticipated results. He told me he did not understand what was the matter with my Coco-Quinine. Then I told him I was using Quin-Coco and he ordered me to stop Quin-Coco and ordered me to buy Eli Lilly's.

By Mr. Rawle: The last part of the answer is objected to as hearsay and as res alios acta.

Q. 13. By Mr. Jones do you refer to Mr. B. F. Jones, the traveling salesman for William R. Warner & Co.?

A. Yes, sir; he is the only Jones that travels in our territory. I don't know his initials.

Q. 14. What did the physician say, if anything, about the preparation?

By Mr. Rawle: Objected to as calling for hearsay and for a transaction which can not affect the rights of the defendant.

A. He told me he didn't want me to use it any more, he didn't get the results that he anticipated. He said it was substitution, that I was substituting his prescriptions.

Q. 15. How was his prescription written on which you supplied the Quin-Coco?

A. "Coco-Quinine."

322 Q. 16. What was the name of the physician?

A. W. E. Kitredge, of Napoleonville, and Dr. T. B. Pugh, was another.

Q. 17. Are both of these physicians still in practice in Napoleonville?

A. Yes, sir.

Q. 18. Have you at any other time ever purchased Quin-Coco from Mr. Jones or any one else?

A. Not since that time.

Q. 19. Have you ever been solicited by Mr. Jones or any one else to buy Quin-Coco since that time?

A. Yes, sir.

Q. 20. Please explain when and what was said on such occasion?

A. Well, I don't remember exactly, but it was two or three months ago when Mr. Jones and a special representative of the laboratories, or one who represented himself as such, came on his regular trip and offered the same products, and said that they had been selling it all along for Coco-Quinine, to be used as Coco-Quinine.

Q. 21. Do you remember who the special representative was?

A. I don't remember his name.

Q. 22. Did he represent himself as a special representative of the manufacturers of Quin-Coco?

A. Yes, of Quin-Coco and all the line of Warner. He said he was from their laboratories and knew exactly how the products were made. He said he could vouch for same, because when I told him that I had kicks about it he said he could vouch for it.

Q. 23. Do you know whether your physicians were satisfied after you quit supplying Quin-Coco and returned to the Lilly preparation in filling their prescriptions?

Mr. Rawle: Objected to as calling for hearsay and as irrelevant and immaterial.

A. I had no complaints afterwards.

Direct-examination closed.

323 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 24. How large a place is Napoleonville?

A. The census says 1,200, but we are about 1,600, and there are three drug stores there.

X Q. 25. Much malaria there?

A. At times, not more than any other place, in Southwest Louisiana.

X Q. 26. Less than there used to be four or five years ago since they began to make war on the mosquitoes?

A. Well we never had no mosquito fight in our section. But it is about the same thing, sir.

X Q. 27. Did Jones tell you three or four years ago that Quin-Coco was taking the place of Coco-Quinine with the physicians?

A. Yes, sir; he told me they used it for Coco-Quinine.

X Q. 28. In prescriptions?

A. Yes, sir.

X Q. 29. Please give his exact words just as he said it, and what you said?

A. I can't remember four or five years back, but I tell you what he told me. He said he was selling a lot of it to physicians. He said, "I am selling a lot of it to physicians for use in their practice and thereby they make more money than by buying Coco-Quinine, and are getting the same results." And that is where he and I differ. I told him that my physicians wouldn't stand for it.

X Q. 30. Then Jones called on you two or three months ago with another man?

A. Yes, sir.

X Q. 31. At that interview did they say they had been selling it to physicians?

A. Physicians and all their trade, they didn't just specifically say physicians, all their trade or their customers.

324 X Q. 32. To take the place of Coco-Quinine?

A. Yes, sir.

Cross-examination closed.

Deposition closed.

CHARLES HENO.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

HARRY W. LYLE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Harry W. Lyle; age 43; New Orleans, La.; salesman for Eli Lilly & Co.

Q. 2. What territory do you cover and what are your duties?

A. City of New Orleans, selling goods to the retail drug trade, and detailing physicians, in behalf of the Eli Lilly & Co., entire line of pharmaceuticals. Orders that I take are filled through the jobbing trade of New Orleans.

Q. 3. Please explain as to the demand for Coco-Quinine in your territory?

A. Yes, there is a general demand from all the retail drug trade of the city, being purchased by them in pint packages up to one gallon packages.

Q. 4. Do many physicians prescribe it?

A. Quite a number practically all of those that I call on who do a general practice.

Q. 5. Who are the jobbing houses of New Orleans?

325 A. I. L. Lyons & Co., Parker-Blake Company and Finlay-Dicks & Co.

Q. 6. Are these all of the jobbers in this territory?

A. They are the only ones that I solicit business through and they are the only ones in the city, with the exception of one small concern who does not handle the line.

Q. 7. Are the concerns named large concerns and do they do a large business?

A. Yes; all three are of about equal importance. All three of them do a very large business in New Orleans and in the surrounding territory.

Q. 8. What are the leading drug stores known as prescription drug stores in New Orleans?

A. Max Samson; Katz & Besthaff and J. A. Legendre. Of these three Max Samson is considered the leading prescription pharmacy of the city. I speak now of the prescription pharmacies down town. Of the suburban stores Mr. Edward H. Walsdorf, Magazine & Peters Avenue, does one of the largest prescription business-. Mr. Walsdorf occupies a very prominent position in local and State pharmaceutical matters, being the ex-president of the Louisiana State Pharmaceutical Association and at present chairman of the executive committee of that association.

X Q. 9. Have you ever seen Quin-Coco in the retail drug stores of this city on your visits?

By Mr. Rawle: Objected to as irrelevant.

A. Yes, sir, repeatedly, very generally, mostly in packages of one gallon.

Q. 10. Do you know anything about its being sold or dispensed as a substitute for Lilly's Coco-Quinine?

By Mr. Rawle: Objected to as calling for hearsay and for transactions which are res inter alios acta and which do not bind the defendant.

A. Naturally the only information that I have is that obtained from the retail druggists themselves, not having had occasion
326 to dispense it myself. Practically all of the retail druggists who have bought this preparation have stated to me frankly that they bought it because it was cheaper than the article I was selling known as "Coco-Quinine," and that they were selling it over the counter upon receiving a call for chocolate quinine. That is about the extent of my knowledge regarding the sale of the preparation known as "Quin-Coco." I have had one physician to complain that he had quit prescribing Coco-Quinine as he did not get the results from it which he formerly did, and that for that reason he no longer used the Lilly preparation or prescribed Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay and as stating no fact which can affect the defendant's rights.

Direct examination closed.

No cross-examination.

HARRY W. LYLE.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EDWARD H. WALSDORF, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edward H. Walsdorf; age 42; New Orleans, La., retail druggist and pharmacist.

Q. 2. How long have you been in the drug business and what has been your experience?

327 A. Twenty-eight years. I have had a great deal of experience, I do a great, large business, a big prescription business, and at one time had eighteen people employed, and ran three stores for seven or eight years. I have been president of the State Pharmaceutical Association, am ex-secretary of the Louisiana State Board of Pharmacy, Examiner in Chemistry and Materia Medica, and now chairman of the executive committee of the Louisiana State Pharmaceutical Association.

Q. 3. Do you handle a product known as Coco-Quinine and if so whose product do you recognize it to be?

A. I do. It is the product of Eli Lilly & Co.

Q. 4. How did you dispense this product?

A. On prescriptions and whenever called for over the counter, in my own bottles.

Q. 5. Did you ever know of a cocoa or chocolate quinine preparation prior to the time Coco-Quinine was introduced by Eli Lilly & Co.?

A. None to my knowledge.

Q. 6. Have you ever seen a physician's prescription written for a product called "Quin-Coco"?

A. I have not.

Q. 7. Have you ever had a customer ask for "Quin-Coco" over the counter?

A. I have not.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. In your large business, of course, many customers might have called for a preparation without your knowing it?

A. I don't think they would call for Coco-Quin, I mean Quin-Coco.

X Q. 9. I ask if it may not be possible that many calls for preparations have been made in your large business without your knowing it?

328 A. It is possible, but hardly likely or not likely.

X Q. 10. Didn't you say you once had seven stores?

A. Three.

X Q. 11. Will you consider for a moment, and say whether before you knew of Lilly's Coco-Quinine you ever knew of some other preparation made of a combination of chocolate and some derivative of cinchona, whether in tablet or liquid form?

By Mr. Bradford: Objected to so far as relating to tablet form as irrelevant and immaterial.

A. I have in tablets, but not in liquid form, never in liquid form. I. Lyons & Co., many years ago, had a chocolate quinine lozenger I think it was, many years ago. It was Lyons' Chocolate Quinine Lozenger.

X Q. 12. What were the ingredients?

A. I suppose quinine and chocolate.

X Q. 13. Was this over sixteen years ago?

A. Yes, sir. It wasn't a good preparation. It would not keep; would become mildewed and we would have to destroy them, throw them in the garbage.

X Q. 14. What color were they?

A. Chocolate color, a grayish chocolate.

X Q. 15. Who made them?

A. I believe I. Lyons & Co.

X Q. 16. Whereabouts?

A. In New Orleans, La.

X Q. 17. Did you dispense them?

A. I did.

X Q. 18. For how many years?

A. I don't remember how many years.

X Q. 19. Give an estimate?

A. About three or four years.

X Q. 20. When fresh made were they satisfactory?

By Mr. Bradford: The question is objected to and all of the questions relating to this tablet as absolutely having no place in the record, wholly irrelevant and immaterial.

329 A. They were.

X Q. 21. How many grains per tablet?

By Mr. Bradford: Same objection.

A. I don't quite remember.

X Q. 22. Have you known calls for a "chocolate quinine" preparation in any of your stores? I mean where a customer used those words or similar words without giving any trade name? Can you answer yes or no?

A. Yes.

X Q. 23. Of course you have had calls for Coco-Quinine, have you?

A. I have, many calls.

X Q. 24. And your customers are men, women and children from all ranks and conditions of life, are they not?

A. Yes, sir.

X Q. 25. About what proportion of the calls are cases where the customer gives the trade name of a preparation of this sort and what proportion are the cases where the customer uses "chocolate quinine" preparation or similar words, but without giving any trade name?

A. About fifty per cent, about half.

X Q. 26. Have you ever before Coco-Quinine, Lilly, came out, made any liquid or other chocolate quinine preparation or combination in your business?

A. No, sir, never.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 27. Referring to the Lyon lozenger which you have mentioned, do you know whether this lozenger was a success and attained any considerable sale or was generally known?

330 A. It sold very well, but it was generally known to be no good. The sales were local. It was known to be absolutely no good, had no virtue in it unless used when first made. It would mould and deteriorate in two or three days.

Re-direct closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 28. You don't wish to vary your answer to X Q. 20, do you?

A. When fresh made they were satisfactory. What I mean by that is if you used them right away, that is what I meant in my last answer.

R. X Q. 29. When first made they were good therapeutically?

A. When fresh made.

R. X Q. 30. But they didn't keep?

A. No, sir.

Deposition closed.

EDW. H. WALSDORF.

Subscribed and sworn to before me this 6th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Brook Haven, Miss., tomorrow at 1 o'clock p. m.

Brook Haven, Miss.,

The Inez Hotel, April 7, 1915—1 p. m.

Met pursuant to adjournment, at the Inez Hotel.

Parties present as before.

331 Dr. O. N. ARRINGTON, a witness called by and — behalf of the plaintiff, having been first duly sworn, deposes and says

as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. O. N. Arrington; age 38; Brook Haven, Miss.; physician.
Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and, if so, whose product do you recognize it to be?
A. Yes, sir; Eli Lilly's.
Q. 3. How long have you been familiar with this preparation?
A. As well as I remember since I have been practicing medicine, for about eight years.
Q. 4. Do you use it in your practice?
A. Yes, sir.
Q. 5. How do you write your prescriptions for Coco-Quinine?

By Mr. Rawle: Objected to as irrelevant.

A. Just "Coco-Quinine" with the directions following.
Q. 6. Do you intend when specifying the preparation by this name to specify Lilly's preparation only?
A. Yes.
Q. 7. Did you know of any other coco-qui-ne preparation of liquid form on the market before Eli Lilly's Coco-Quinine was introduced?
A. No, sir.
Q. 8. Has this preparation been used by you in your practice, continuous over the period of eight years you have mentioned?
A. Yes, sir.

Direct-examination closed.

332 Cross-examination.

By Mr. Rawle:

X Q. 9. Do you dispense your own drugs or do you furnish medicines to your patients only by means of prescriptions?
A. This preparation only by prescription, as I do not carry it with me.
X Q. 10. X Q. 9 repeated.
A. I dispense this preparation only by prescription but I do carry some other drugs with me and dispense them, but not this preparation.
X Q. 11. What proportion of the drugs prescribed by you for your patients are furnished on your prescriptions and what proportion thereof do you personally dispense to your patients?

By Mr. Bradford: Objected to as wholly irrelevant and immaterial.

A. I might answer that this way. All that I administer prac-

tically is emergency drugs, ordinarily called. Drugs that can be had from the drug stores and where time will admit are dispensed by prescriptions.

Cross-examination closed.

Deposition closed. O. N. ARRINGTON, M. D.

Subscribed and sworn to before me this 7th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

SOL C. RAY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

333 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Sol C. Ray; age 34; Brook Haven, Miss.; retail druggist; that is, prescription clerk for the Price Drug Company of this city.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. Yes, sir; Eli Lilly's.

Q. 3. How long have you been familiar with this preparation?

A. For the last thirteen years.

Q. 4. Did you know of any other liquid chocolate quinine or cocoa quinine preparation on the market before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No, sir.

Q. 5. How long have you been in the drug business?

A. Sixteen years.

Q. 6. Do you dispense this product on prescriptions or calls or both?

A. Both, in our own bottles. We label it "Coco-Quinine" just as we label "paregoric," "listerine" or anything else.

Q. 7. Have you ever been solicited to buy a product called "Quin-Coco," and if so, will you relate the circumstances as nearly as you can?

A. Yes, we have been solicited to buy "Quin-Coco," to sell when chocolate quinine was asked for and to use in place of Coco-Quinine, if we desired to use it, on prescriptions. We have had a number of prescriptions for Quin-Coco and for that reason we have to keep some of it on hand. We used to but we haven't had any in about a year. I don't remember just when the last was bought. I didn't do the buying for about three or four months after I came back from Bude, the 6th of last May. I was away from here about fifteen months.

334 By Mr. Rawle: The answer is objected to as not connected with the defendants and as not stating facts but only generalities.

Q. 8. Who offered Quin-Coco to you, and on behalf of what manufacturing house?

A. Mr. Howard Smith was the first and then Mr. Gonzales.

Q. 9. What house did they represent?

A. Do you want all the houses they represent? William R. Warner, the Pfeiffer Chemical Company and Searle & Hereth.

Q. 10. Can you remember what was said to you by either of these gentlemen relative to Quin-Coco and Coco-Quinine? If so, will you please state, specifying which salesman made the statements you refer to?

A. We were offered the Quin-Coco as an article that we could dispense or sell at a bigger profit than we could the Coco-Quinine by both Mr. Smith and Mr. Gonzales.

Q. 11. Was it your understanding of their representations that you could use Quin-Coco to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to because the witness has already been asked to state what was said and has answered the question; also as leading; and because the witness' understanding is not evidence.

A. Yes, sir; that was the understanding.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 12. When did Howard Smith call on you and solicit a sale of Quin-Coco?

A. In 1911 and '12, I think, I couldn't give you the exact date.

335 X Q. 13. Were you buying stock at that time for your store?

A. I was buying for the Price Drug Company.

X Q. 14. Can you fix the date?

A. I could not, no, sir.

X Q. 15. Can you fix it within a month or six months?

A. Mr. Smith lived at Weston and came to Brook Haven about every five or six weeks while in the employ of Warner.

X Q. 16. And solicited your trade every five or six weeks?

A. He solicited trade, yes, sir.

X Q. 17. Your trade?

A. He solicited orders from the Price Drug Company.

X Q. 18. Were you present every time?

A. No, sir; not every time.

X Q. 19. Most of the times?

A. Yes, sir; most of the times.

X Q. 20. Did you ever buy anything from him?

A. Yes, sir; we bought something from him nearly every time he came, some pharmaceuticals of some description.

X Q. 21. Do you suppose he made as many as twenty-five calls on your Price Drug Store to solicit business at which you were present?

A. If you mean while in the employ of Warner he did.

X Q. 22. As many as fifty?

A. I couldn't answer that positively.

X Q. 23. About how many do you think?

A. I should say about thirty-five or forty times.

X Q. 24. To which one of these calls did you refer to above in answer to Q. 8?

A. Mr. Howard Smith.

X Q. 25. I mean to which one of the thirty-five or forty calls that you say Mr. Howard Smith made on you do you refer in your answer to Q. 8?

336 A. We take the catalogue and go through it and order what we need as the articles are called off by the traveling men, by Mr. Smith, or whoever the traveling man should be.

X Q. 26. You say Smith called on you thirty-five or forty times, is that right?

A. Yes, sir.

X Q. 27. And you said something above about his having talked to you about Quin-Coco; is that right?

A. Yes, sir.

X Q. 28. On which one of the thirty-five or forty calls was it that he talked to you about Quin-Coco in the way you have stated above?

A. On almost every call.

X Q. 29. How often did you buy Quin-Coco from him?

A. I would have to look at the invoices to tell exactly.

X Q. 30. As many as five times?

A. In the two years; yes, sir.

X Q. 31. Ten times?

A. I don't think so.

X Q. 32. Please state just what Smith said to you, giving his exact words?

A. That would be impossible, to give the words.

X Q. 33. Can't you give any of them?

A. He said that we could dispense Quin-Coco when chocolate quinine was called for or when Coco-Quinine was called for at a saving of about a dollar a gallon.

X Q. 34. You say he said that you could dispense Quin-Coco when chocolate quinine was caled for. That would be all right, wouldn't it?

A. When chocolate quinine was called for; yes, sir.

X Q. 35. Are you clear that he said you could dispense Quin-Coco when Coco-Quinine was called for?

A. Yes, sir.

337 X Q. 36. How do your customers call for these preparations, by the trade name, or do they call it chocolate quinine a good deal of the time.

A. I would say about half the people call for chocolate quinine and about half for Coco-Quinine.

X Q. 37. Do you consider it a square thing as a druggist, when Coco-Quinine is called for to sell Quin-Coco, without saying anything about it to the customer?

A. No, sir.

X Q. 38. You don't do it, do you?

A. No, sir.

X Q. 39. It isn't considered honest among druggists, is it?
A. No; that would be substituting.
X Q. 40. Is Smith, in your opinion, a square man? Have you known him long?
A. About eight years.
X Q. 41. Have you always thought him a square man?
A. Yes, I always thought he was a good man.
X Q. 42. If he was a good man did you consider that he was making a proposal to you to do a thing which was not honest or square as a druggist—substitution? I mean at all those thirty-five or forty calls.
A. I don't believe that it was right and we didn't buy Quin-Coco to substitute for Coco-Quinine when Coco-Quinine was called for, but to dispense when chocolate quinine was called for and to dispense on prescriptions for Quin-Coco.
X Q. 43. When he called on you all these times did you understand from him that he was making you a dishonest proposal to buy Quin-Coco and dishonestly, as a druggist, substitute it on your doctor's prescriptions? I am asking you whether that is a kind of a proposition he was making you as you understood it?
A. As I understood it, that was a part of his proposition.
X Q. 44. Every time he called.
338 A. I can't say that he did it every time that he called, and I couldn't fix any specific date that he did make the proposition.
X Q. 45. As you are an honest druggist and you say he was making you a dishonest proposal to substitute, how did you answer him?
A. I told him that we didn't want it to use as a substitute at all for calls for Coco-Quinine. We didn't feel that we were substituting when we sold it for chocolate quinine.
X Q. 46. I want to know if you thought he was making you a dishonest proposition?

By Mr. Bradford: Objected to as immaterial and irrelevant.
By Mr. Rawle: Question withdrawn.

X Q. 47. I want to know if you understood at the time that the proposition that he was making you was dishonest?

By Mr. Bradford: Same objection.

A. I knew that the proposition wasn't right, but Smith was a good friend of ours and we never had any arguments in regards to it.
X Q. 48. Is the conversation clear in your mind?
A. As to Mr. Smith's meaning?
X Q. 49. No, as to what he said?
A. In substance it is.
X Q. 50. Can't you give his words?
A. No, I couldn't give his exact words.
X Q. 51. Did he tell you that you could substitute Quin-Coco on doctors' prescriptions, and did he say so distinctly?

A. He did.

X Q. 52. Did he say that you could substitute Quin-Coco on doctors' prescriptions by getting the consent of the doctor to do so?

A. Nothing was ever said about the doctor.

339 X Q. 53. Do you mean that he said that you could sell Quin-Coco over the counter on calls for Coco-Quinine, without informing the customer of what you were doing?

A. Yes, sir.

X Q. 54. This is a pretty serious accusation to make against a salesman. Do you feel sure you are right in making it?

A. I know I am right.

X Q. 55. Who did you first mention these interviews to?

A. I really couldn't tell you.

X Q. 56. When did you first mention them to anybody connected with the Lilly Company?

A. I have talked to Mr. Fly about it on several occasions in the last year or so, when he would mention the stock of Coco-Quinine we had on hand and refer to it.

X Q. 57. Did you tell Fly that you were substituting Quin-Coco for Coco-Quinine?

A. No, sir.

X Q. 58. Were you?

A. No, sir.

X Q. 59. Neither on prescriptions nor over the counter?

A. No, sir.

X Q. 60. Then you have never substituted Quin-Coco for Coco-Quinine on prescriptions or over the counter?

A. I have never substituted it on prescriptions and don't think that I have otherwise over the counter. We usually label those things as they call for it. If they call for chocolate quinine I label it like they call for it, to save explanation. I am speaking personally not for the manager of the business, or any of the other clerks. I don't know what they did.

X Q. 61. If as you say you consider Smith a good man and he was trying to sell you Quin-Coco and introduce it into your

340 store, isn't it possible that he didn't mean to be dishonest but merely meant that you should dispense Quin-Coco when you could and if Coco-Quinine was called for tell the people if you were giving them Quin-Coco?

A. It is possible, but we were never advised to offer explanations to customers or to doctors, for that matter.

X Q. 62. Then you think that you might perhaps have misunderstood Smith and that he wasn't proposing anything dishonest to you?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

A. I didn't misunderstand the meaning of the proposition.

X Q. 63. That is what you understood, is it? I mean the way you have given it.

A. The way the question was answered, yes, sir. Smith was

good friend of ours and we tried to give him an order for something every time he came to town.

X Q. 64. I understand you have stated what was your understanding of Smith's proposal. Is that correct?

A. Yes, sir; that is the way I understood him.

X Q. 65. Do you swear positively that that was also Smith's understanding of his proposal, or might you have misunderstood him?

A. I have always been under the impression that Quin-Coco was put out for that purpose.

By Mr. Rawle: Answer is objected to as not responsive and as immaterial.

X Q. 66. Please answer the question.

Question reread.

By Mr. Bradford: The question is objected to, the first part because it is incompetent, and the second part because it has already been answered many times.

341 A. I can answer only for myself. I don't know what Mr. Smith's understanding was. I have answered the question just as I understood the proposition to buy the goods from time to time.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 67. You said you always thought Quin-Coco was put out for a purpose. Will you please explain for what purpose?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. To take the place of Coco-Quinine at a saving of about a dollar a gallon to the druggist.

R. D. Q. 68. What preparation had you supplied to your trade when chocolate quinine was asked for before you bought Quin-Coco?

A. Coco-Quinine and occasionally we made up some chocolate quinine on a prescription calling for quinine and chocolate syrup, called for so many grains of quinine and so much chocolate syrup.

R. D. Q. 69. What kind of chocolate syrup?

By Mr. Rawle: Objected to as irrelevant.

A. It was a prescription from a physician and he told me to use fountain chocolate syrup.

Recross-examination, without waiving objections.

By Mr. Rawle:

R. X Q. 70. You have said that you always though that Quin-

Coco was put out to take the place of Coco-Quinine. Isn't that what Smith wanted to sell you Quin-Coco for, to take the place of Coco-Quinine as a chocolate quinine preparation?

342 A. That is the way I understood it.

R. X Q. 71. And that is about the substance of what he said to you at these various interviews, isn't it?

A. Yes, sir.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 72. Do you mean by your last answer that you desire to modify anything that you have said in answer to previous direct or cross-questions on this general subject?

By Mr. Rawle: Objected to as improper for re-re-direct-examination and as an attempt to lead the witness.

A. No, sir, I think that is as near as possible what I said before.

R. R. D. Q. 73. You mean that your statements relative to these matters are as correct as you can make them?

(Same objection.)

A. I think it is as correct as it is possible for me to make them.

Deposition closed. SOL. C. RAY.

Subscribed and sworn to before me this 7th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Hattiesburg, Miss., at Hotel Hattiesburg, at 8 p. m., today, April 7th, 1915.

343 Hattiesburg, Miss.,
Hattiesburg Hotel, April 7th, 1915—8 p. m.

Met pursuant to adjournment at Hotel Hattiesburg.

Parties present as before.

FLOYD I. AMES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Floyd I. Ames; age, 29; Hattiesburg, Miss.; Retail Druggist. I am a Partner and Manager in the Century Drug Store of this City.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if you do, whose product do you recognize it to be, and about how long have you handled it?

A. We do. The product of Eli Lilly & Co. We have handled it ever since it has been on the market I guess, for at least ten years or more.

Q. 3. How do you dispense it?

A. On prescriptions and as called for, in our own bottles under our own labels.

Q. 4. Have you had a considerable and continuous sale for it during all these years?

A. Yes, we have had quite a sale for it during all these years.

Q. 5. Have you ever received any prescriptions calling for Quin-Coco?

A. Not that I remember of.

344 Q. 6. Have you ever had any calls for Quin-Coco over the counter from customers?

A. I can't recall ever having had any.

Direct-examination closed.

No Cross-examination.

Deposition closed.

FLOYD I. AMES.

Subscribed and sworn to before me this 7th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Laurel, Miss., tomorrow, April 8th, 1915, at Hotel Pinehurst, at 9 a. m.

Laurel, Miss.,
Hotel Pinehurst, April 8th, 1915—9 a. m.

Met pursuant to adjournment, at the Hotel Pinehurst.
Parties present as before.

WESLEY S. AMES, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Wesley S. Ames; age, 24; Laurel, Miss.; Retail Druggist, Manager of the Century Drug Store, at Laurel.

345 Q. 2. Do you handle a preparation at your store known as Coco-Quinine, and if so, whose product is it?

A. I do, and it is known as the product of Eli Lilly & Co.

Q. 3. How do you dispense Coco-Quinine?

A. As "Coco-Quinine" when it is written on the prescription or called for by the laity, when the laity call for chocolate quinine and the like, in our own bottles labeled "Coco-Quinine."

Q. 4. How long have you been handling Coco-Quinine?

A. I don't know just exactly, but about ten years I think.

Q. 5. Did you know of any other liquid quinine preparation flavored and colored with chocolate before Coco-Quinine was brought to your attention?

A. No, sir, I did not.

Q. 6. Do you have a considerable demand for this preparation at your store?

A. Yes, sir, we have a pretty good demand for it.

Q. 7. Have you ever had any prescriptions at your store for the product called "Quin-Coco?"

A. I don't know positively about that, I know of no specific one right now.

Q. 8. Do you remember of ever receiving a call from a customer for Quin-Coco at your store?

A. They designate Coco-Quinine, the laity, when they come in and ask for chocolate quinine and it is possible that I have had them to call it Quin-Coco.

Q. 9. I asked you if you ever remember of any customer calling for Quin-Coco?

A. I do not remember that they have asked for Quin-Coco.

Q. 10. When a customer asks for chocolate quinine, what preparation do you understand they intend?

By Mr. Rawle: Objected to as immaterial.

A. I understand them to want Coco-Quinine.

346 Q. 11. Have you ever been solicited to buy Quin-Coco, and if so, on what representations?

By Mr. Rawle: Objected to as an improper question, the only proper question being, what was said.

A. Quin-Coco has been offered to me for sale as a similar preparation to Coco-Quinine, and I have been told that I could dispense it on calls for Coco-Quinine, without detection, and that it was the same goods exactly. That's about the only representations I have had.

By Mr. Rawle: The answer is objected to as not stating the facts of the transaction.

Q. 12. Was anything said about price?

By Mr. Rawle: Objected to as improper, the only proper question being as to what was said, and as leading.

A. It was quoted at a cheaper price to me than Coco-Quinine.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle·

X Q. 13. I suppose that your customers in your store are men, women and children of all classes in life?

A. Yes, sir.

X Q. 14. Is "cocoa" as a name for a certain article as commonly used by the laity as "chocolate?" I am speaking now of the raw material which is very commonly called chocolate, for instance, in connection with candy, and what I am asking you is whether the laity are not more familiar with the word "chocolate" than they are with the word "cocoa." I am not referring to any drug or pharmaceutical preparation.

A. The laity regard cocoa as chocolate. They don't re-
347 gard it as a medicine, and it is used just as commonly, as far as I know.

X Q. 15. You say that the laity usually ask at your store for chocolate quinine? Is that right?

A. They ask for chocolate quinine occasionally, because they get chocolate and cocoa confused in their minds, I suppose.

X Q. 16. You testified that "the laity when they come in and ask for chocolate quinine." Do they commonly come in and call for chocolate quinine?

A. They do quite frequently. I will illustrate that to you. A man will come in and say "My wife wants me to get some quinine syrup for the baby, I believe she said chocolate or cocoa or something like that." I have calls frequently like that. And my interpretation of an order like that is that they want Coco-Quinine.

X Q. 17. Is that the only kind of quinine syrup for the baby that you keep?

A. The only kind in a chocolate base.

X Q. 18. And you don't keep Quin-Coco?

A. No, sir.

X Q. 19. Do you know anything about it?

A. Not from actual experience by handling it, no, sir.

X Q. 20. You have given me one illustration of how a customer comes in and what he asks for. Can you give me another one? Do the customers sometimes ask for a chocolate quinine preparation?

A. They do, yes, sir.

X Q. 21. Is that quite common?

A. It is.

X Q. 22. Can you mention any other words in which they ask for such a preparation as that?

A. No, only in my other answer.

X Q. 23. What proportion of the laity, old and young, rich and poor, ask for such a preparation, and call for it by its exact name of "Coco-Quinine?" You can answer approximately.

348 A. Well, it is hard to say just exactly, but at least two-thirds of them anyway, to the best of my knowledge.

X Q. 24. At least two-thirds of them ask for which?

A. "Coco-Quinine."

X Q. 25. How long have you done the buying for the Century Drug Store, of this City?

A. Fourteen months.

X Q. 26. Are you the only one that does the buying for it?

A. I am, and have been.

X Q. 27. Give the name of the salesman who offered you Quin-Coco?

A. I can't remember the name, I can't remember just who he was. He was representing the Pfeiffer Chemical Company I believe, or whoever manufactures it.

X Q. 28. When was this?

A. I don't remember the date.

X Q. 29. Had he ever solicited the trade of the Century Drug Store before that?

A. He never had because we have only been in business fourteen months.

X Q. 30. Was this his first call on you at that drug store?

A. As I remember it was, at this store, yes.

X Q. 31. Has he ever solicited your business since that first call?

A. A representative of the same people call on me now, a Mr. Jones. However, I don't remember if he is the man that had offered me Quin-Coco or that he has offered it to me.

X Q. 32. How often has Mr. Jones called on you and solicited your trade?

A. Three or four times as nearly as I remember, since I have been here.

X Q. 33. You can't state positively, can you, that it was Jones who offered you Quin-Coco for sale? I refer to your answer to Q. 11.

349 A. I cannot state positively that it was Mr. Jones, because in buying a person does not pay any attention, having so many salesmen call on them, and don't know the names of a third of them who do call.

X Q. 34. Do you state positively that you had a call from another Warner salesman before Jones first called on you?

A. No, I didn't say another Warner salesman. I said I didn't remember whether it was Mr. Jones or not because I am under oath here and giving my testimony to the best of my knowledge and I am not stating any specific facts unless I know it to be a fact.

X Q. 35. State your best recollection as to whether it was Jones or another Warner salesman?

A. My best recollection is that it was Mr. Jones. However, I may be mistaken in that.

X Q. 36. When this salesman called, did he offer you a full line of Warner preparations?

A. He offered me Warner's goods, and Searle & Hereth and other lines manufactured by the people that he worked for, or controlled by them.

X Q. 37. How many different items or articles in the lines he offered you at that interview, did you talk about?

A. I can't remember. I rather think we reviewed the whole line just like other salesmen do.

X Q. 38. How long was the conversation?

A. I can't say exactly. It may have been thirty minutes, or it may have been an hour.

X Q. 39. Did you buy anything from him?

A. I don't remember that I bought anything at that time, I have bought stuff from that concern since I have been here.

X Q. 40. Why can't you remember whether you bought anything from him at that time?

A. Because I have on an average of three or four traveling men call on me every day in the week, every week in the year, and with the other duties connected with running the business I can't remember.

350 X Q. 41. Where was the interview held?

A. At the Century Drug Store, Laurel, Miss.

X Q. 42. Do you remember in what part of the drug store?

A. Out in the store, in the lobby part. By "lobby" I mean not behind the counter, but in front of the counter.

X Q. 43. Please state the exact words which Mr. Jones used in offering you Quin-Coco, as far as you can remember them?

A. To begin with, I won't state that Mr. Jones was the salesman that offered me Quin-Coco positively. But Quin-Coco has been represented to me as being identical with Coco-Quinine and offered to me at a cheaper price.

X Q. 44. Did that salesman offer it to you at that time as being identical with Coco-Quinine and cheaper?

A. Yes, sir.

X Q. 45. What else did he say?

A. Not anything of any importance other than that it was just chocolate quinine, chocolate syrup of quinine in it and that it was identical with Coco-Quinine. He probably said something else but I don't exactly remember verbatim.

X Q. 46. Please try to remember what else he said, if anything, and give the exact words in which he said it?

A. It is hard to answer that question, because he didn't say anything more than any other salesman would say when he is offering a similar preparation to one that is already on the market.

X Q. 47. Is yours a large drug store, doing a large business?

A. Not a very large one, it is an average drug store.

X Q. 48. How many are there in this city?

A. Five, including ours, and a suburban drug store.

351 X Q. 49. About where do you stand on the volume of the business, compared with the others?

A. We think we do about next to the biggest in town.

X Q. 50. Can you give me any instances in which you carry in stock two lines of similar preparations made by different pharmaceutical manufacturers, so that I can understand more clearly your answer to X Q. 46?

By Mr. Bradford: Objcted to as not cross-examination, as immaterial and irrelevant.

A. I can think of some similar preparations as there are pills similar to lapactic pills in formulæ. They have different names.

Lapactic pills are made by Sharpe & Doehme. I have got a pill in stock called "Evacuant." It is made by Parke, Davis & Co., as well as I remember, the formulæ being the same as lapactic, I think.

I have got preparations that are similar to listerine in formulæ. Listerine is made by Lambert of St. Louis. There is a similar preparation made by Parke, Davis, called "Euthymol."

X Q. 51. You have a Parke, Davis preparation similar to listerine. Have you a Lilly preparation similar to listerine? I think it is euchalyptus and thymol compound.

By Mr. Bradford: Objection repeated.

A. I can't say how my stock is just now. I think Eli Lilly & Co. make a euchalyptus and thymol antiseptic solution.

X Q. 52. Have you ever carried it in stock?

(Same objection.)

A. And I have dispensed it, but not in tablet form.

X Q. 53. Please give me another instance, of two similar preparations or articles which you know of or carry in stock?

(Same objection.)

352 A. Dioxygen and peroxide of hydrogen. Dioxygen made by Oakland Chemical Company and peroxide by most anybody. I can make it if I had the apparatus.

X Q. 54. Do you know of "Tabloid, Rhubarb, Calomel and Colocynth Compound, made in London by Burrows, Welcome & Co.?

(Same objection.)

A. Yes, sir.

X Q. 55. Ever carried it in stock?

(Same objection.)

A. Yes, sir.

X Q. 56. Has Lilly got a similar preparation?

(Same objection.)

A. I think they have, but I wouldn't say positively, as I am not running Mr. Lilly's business.

X Q. 57. Isn't Lilly's product called "Tablets, Calomel, Rhubarb and Colocynth Compound?"

(Same objection.)

A. I can't say. I don't know about it, sir. I haven't got them in stock now.

X Q. 58. Mention some other cases which you know of or carry in stock of similar preparations?

(Same objection.)

A. I don't know any other, I don't recall any.

X Q. 59. Do you know of a preparation called "Haydens Viburnum Compound?" Do you carry it and do you know of a similar preparation by another house?

By Mr. Bradford: Same objection. Counsel for plaintiff calls the court's attention to the flagrant breach of the privilege of cross-examination being indulged in by counsel for defendant and to the further fact that he has requested counsel for defendant to
353 desist and to take his own testimony in his own time and at his own expense, further stating that he has no objection to having all of the information which these questions seek to bring out brought to the attention of the court, but believes that this is neither the time, the place, or the method proper to use for the purpose.

By Mr. Rawle: Mr. Rawle states that he believes that he is cross-examining within the strict limit of proper practice and not beyond it, and refers to X Q. 46.

A. I carry "Haydens Viburnum Compound" in stock made by Hayden Chemical Company, I think and I have got other preparation with viburnum in them. I don't know whether they are similar to Hayden's viburnum or not and never would attempt to use one of these to take the place of Hayden's.

X Q. 60. Do you know or do you carry "Glyco-Thymoline" and also any similar preparation? Give the names and the names of the makers?

(Same objection.)

A. I know of Glyco-Thymoline and carry it in stock. It is made by Kress and Owen, and I know of Borol made by Parke, Davis, which is similar and Eli Lilly makes an alkaline antiseptic solution I think, which is similar. There may be others, I don't know.

X Q. 61. I should like to ask you again, because there seems to be a discrepancy in what you have said, whether there isn't a majority of the customers of all ages and conditions who ask for a chocolate preparation or a syrup of quinine or a sweet or tasteless quinine, without giving the exact trade name of the preparation?

A. No, sir, there isn't a majority. My experience hasn't been a majority.

Cross-examination closed.

354 Redirect examination.

R. D. Q. 62. Where were you in business before becoming manager of the Century Drug Company here?

A. I was a druggist with the Century Drug Store at Hattiesburg. This is a branch of the Hattiesburg store.

R. D. Q. 63. Have your answers been based upon your experience at both the Hattiesburg and the Laurel stores?

A. Yes, sir.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 64. Did you do the buying for the Hattiesburg concern?
A. I did the buying of the pharmaceuticals, yes, sir.

Deposition closed. WESLEY S. AMES.

Subscribed and sworn to before me this 8th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

ANTHONY FLY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Anthony Fly; age, 45; New Orleans, La.; Traveling Salesman for Eli Lilly & Co.

355 Q. 2. What territory do you cover?

A. I cover the territory generally known as South Mississippi, and points in Louisiana east of the Mississippi River.

Q. 3. Do you sell a product known as Coco-Quinine, and if so, what can you tell the court relative to the demand for such product in your territory, and how the demand has been created?

A. Yes, I sell Coco-Quinine and in connection with the commercial end of it it becomes my mission as a repreesntative of Eli Lilly & Co. to detail this item to the medical profession, it being one of our leading specialties.

The demand for Coco-Quinine has been created by Eli Lilly & Co. for years past, by a continued effort on the part of salesmen and special detail representatives of Eli Lilly & Co. in introducing this item to the practicing physicians and the drug stores throughout the country.

Following this line of procedure in the way of detail work there is a very large demand for the product known as Coco-Quinine.

Q. 4. How long have you been in the drug business, and in what capacity, from the beginning to the present time?

A. Practically my entire life has been spent in the retail drug business. The past four years and three months I have been associated with Eli Lilly & Co. in the capacity of a salesman. Being more accurate I can say that I have been associated with the retail drug business for the past twenty-seven years.

At the age of 18 I opened up a business for myself in the town of Centerville, Miss., at which point I remained in business for three or four years and then moved to McComb City, Miss., where I operated a retail drug store almost continuously for about twenty-one or twenty-two years. In 1910 I organized a drug company

356 and opened a very extensive retail drug store in Canal Street, in the City of New Orleans. After severing my connection

with this concern I then became associated with Eli Lilly & Co., and have been constantly in their employ since January 1st, 1911. For the first eight months I covered the territory known as South Georgia and for the remainder of the time the territory above stated.

Q. 5. As a retail druggist before your connection with Eli Lilly & Co. were you familiar with a product known as Coco-Quinine, and if so, how long have you known of it approximately?

A. Yes, I have known Coco-Quinine practically ever since it was placed upon the market. Roughly speaking without consulting any data I would say it covered a period of about fifteen years.

Q. 6. What can you say relative to whether or not this product was an original product of Eli Lilly & Co.?

A. Previous to the introduction of this item known as "Coco-Quinine," there was nothing of a similar character which represented quinine sulphate in a liquid form that had been offered the trade or profession as a proprietary product.

Q. 7. In your work as traveling salesman, do you visit retail drug stores and inspect their stocks of pharmaceuticals, and other products behind the prescription counter?

A. Yes. I make it a point to visit at regular intervals as nearly as possible all retail drug stores, dispensaries, hospitals, sanitariums and such institutions that distribute medicine.

Q. 8. What do you know about the sale of a product called "Quin-Coco" in the territory you cover?

A. I do know that the sale for the item known as "Quin-Coco offered under the label of Searle & Hereth, and distributed under the supervision of the salesmen of William R. Warner & Company.

This product is offered and sold generally as a substitute for
357 Coco-Quinine, based upon the sale and the popularity of the item known as "Coco-Quinine," which has been so strenuously exploited by Eli Lilly & Company for a number of years.

By Mr. Rawle: Mr. Rawle objects to the answer, the last part, as incompetent and inadmissible and as stating an inference and not facts, and even so as based only on the witness's experience of about one per cent of the whole country.

Q. 9. What are your reasons for the statement in your last answer that Quin-Coco is sold as a substitute for Coco-Quinine?

By Mr. Rawle: Objected to because calling for inferences and not for facts, and calling for evidence which does not affect any right of the defendant, being necessarily transactions between third parties.

A. Because it is generally known and accepted by the drug people throughout the entire country as being a piece of goods that is sold upon the strength and the popularity of Coco-Quinine.

By Mr. Rawle: The answer is objected to as giving inferences and not facts and as referring to the entire country in which the witness has had knowledge of only a small section, and as incompetent and inadmissible.

Q. 10. What do you know of your own knowledge on this subject?

A. Many times in soliciting business from the retail buyers in my territory when the item of "Coco-Quinine" is offered I am told "I have plenty on hand. I just received a gallon of Quin-Coco that hasn't been opened." I am also told quite frequently by buyers "Why should I buy Coco-Quinine from Eli Lilly & Co., and pay them $4.80 for a gallon when I can buy Quin-Coco for $3.50."

358 By Mr. Rawle: Objected to because stating transactions between third parties not binding the defendant, and as incompetent and inadmissible.

Q. 11. In your business as a retail druggist did you fill prescriptions yourself?

A. Yes, I did. I was actively engaged in prescription work the entire length of time that I operated a business for myself. I am a registered pharmacist under the laws of the State of Mississippi and for four years occupied the position as President of the Mississippi Board of Examiners, as well as serving a term as President of the Mississippi Pharmaceutical Association.

As a man actively engaged in the filling of prescriptions I felt that the prescription work was a sacred trust, based upon confidence and any departure from the accuracy of dispensing was considered entirely out of my prerogative and as history will bear me out the slogan that I used in connection with my business was "Substitution Considered a Crime."

Q. 12. Did this slogan express your personal sentiments?

A. It undoubtedly did.

By Mr. Rawle: The last two questions are objected to as incompetent and immaterial.

Q. 13. Why did you consider substitution a crime?

(Same objection.)

A. For the reason that in dispensing medicine under the direction of an attending physician I thought that in presuming to substitute one item for another I was taking upon myself a great responsibility and one that did not come within my province, feeling that in presuming to substitute one item for another I might possibly be undoing all that had gone before in the way of diagnosis by the physician who is the legitimate source for the prescribing for his patients.

Direct examination closed.

359 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. I understand that your duties are among other things to call on retail druggists and take orders for Lilly's line of goods and

turn these orders over to a jobber, who fills them. I understand that they are not filled directly from the Lilly factory to such druggists. Am I correct?

A. Not entirely so, for at times, we make what is known as a "drop shipment," the order being filled either by the home office of Eli Lilly & Co. or by one of its branches, the same being billed through the jobber as specified by the customer. As a rule these orders are taken, sent to the jobber to come out with the next regular shipment, as specified by the customer.

X Q. 15. As a business matter, apart from how the goods are shipped, is not the actual sale of a given order made by your house to the jobber and the jobber alone charged for the price?

A. Our policy is to ship exclusively through the jobber and not to bill to the customer direct.

X Q. 16. Do you invariably bill to the jobber?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

A. I have nothing at all to do with the billing, and as I explained the policy of the house is to ship through the jobber and to no retail customer direct. In other words we have no individual transaction with any retail customer, as I understand the policy of Eli Lilly & Co.

X Q. 17. Is it your business to call on retail druggists, show them your line of Lilly goods and solicit orders?

A. It is.

X Q. 18. In this part of your work, wherein are your methods different from those of salesmen of other pharmaceutical houses?

A. Our methods are distinctive. We have one policy for
360 doing business with the retail trade, treating all customers alike, regardless of quantity. We have no bargains, quantity prices, or special deals, to offer any retailer.

X Q. 19. Apart from these virtuous sentiments I ask you whether it is not a part of your business, and a large part of it, to offer Lilly goods to retail druggists?

A. It is.

X Q. 20. Do you know any salesmen of other drug houses?

A. Quite a number of them.

X Q. 21. Don't they call on retail druggists and offer them the goods of their respective houses?

A. I imagine that they do. That is what they are employed for.

X Q. 22. Have you any doubt on the subject?

A. I have never given the subject any thought.

X Q. 23. You have just testified, X Q. 18: "Our methods are distinctive." If you have never given the methods of other salesmen any thought how can you say that your methods are distinctive?

A. My experience as a retail buyer for twenty odd years being approached by divers and sundry manufacturers' and jobbers' salesmen has made me thoroughly competent to express the opinion that the policy of Eli Lilly & Co. is thoroughly distinctive and in a class by itself.

X Q. 24. Do Lilly's salesmen solicit the sale of Lilly goods to retail druggists, yes, or no?

A. Yes.

X Q. 25. Do other drug houses and jobbers have traveling salesmen who visit retail druggists and solicit the sale of their respective lines, yes, or no?

A. They do.

X Q. 26. Then when you visit a retail druggist you talk to him precisely as if you were desiring to sell him the Lilly line of goods, although you are only taking his order for the purpose of
361 turning it over to a jobber. Is that correct?

A. That is, but we stand behind a price that is made and guarantee the customer that he shall be taken care of as applying to any irregularities that might appear on his invoice from his jobber.

X Q. 27. How many items approximately have you in the Lilly line?

A. I have never enumerated them, but it is generally understood that our price list covers approximately five thousand items.

X Q. 28. I understand you to say that the demand for Lilly's products has among other things been created by soliciting sales from druggists and by recommending your goods to physicians. Don't the other drug houses do the same thing?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

A. In some instances they do. In other words, some houses do and some do not.

X Q. 29. Don't most of the drug houses do the same thing?

(Same objection.)

A. Answering that question directly, Mr. Rawle, covers a wide field. Most of the houses do not do what is called "detail" work.

X Q. 30. Don't most of the houses solicit sales from druggists?

A. Most of the houses, what houses?

X Q. 31. I mean drug manufacturers and drug jobbers?

A. They do.

X Q. 32. But you say that not all the drug houses do "detail" work among the doctors, is that correct?

A. Yes, I would say that they don't all do it so far as my knowledge and belief is concerned.

X Q. 33. Do a majority of them do it?

362 A. I am incompetent to answer that, whether a majority of them do it or not.

X Q. 34. What is your belief based upon experience?

A. My belief is that they do not.

X Q. 35. You said something about special salesmen to introduce Quin-Coco to doctors and druggists throughout the country. Do you mean that the Lilly house sends out special salesmen on that preparation alone?

A. I beg to say that I have made no statement whatever in re

gard to Eli Lilly & Co. sending out a special salesman to introduce Quin-Coco.

X Q. 36. Then they don't send out special salesmen to introduce Quin-Coco?

A. No, sir, they do not send out special salesmen to introduce Quin-Coco. We have nothing at all to do with Quin-Coco.

X Q. 37. I see that in the last question I misspoke and said "Quin-Coco" when I meant "Coco-Quinine." I now ask you whether you mean to say that the Lilly house sends out special salesmen to introduce Coco-Quinine to the trade?

A. In answer to this question I will say that every representative of Eli Lilly & Co. is a special salesman to introduce their specialties, prominent among them being Coco-Quinine.

X Q 38. How many other specialties have you in your line approximately?

A. Approximately, about thirty.

By Mr. Bradford: All this line of examination is objected to as wholly irrelevant and immaterial and unnecessary padding of the record.

X Q. 39. About how many drug stores are there in your territory, approximately?

A. Roughly speaking I should say about three hundred.

X Q. 40. Did you ever hear of the word "replacer" in the drug business?

363 A. Only as a gentle covering for the word "substitution."

X Q. 41. Have you ever heard of the term "Copy-formula?"

A. That is not a common term used in connection with the retail drug business.

X Q. 42. Have you in the Lilly line a product called substantially "Tablet, Rhubard, Calomel and Colocynch?"

By Mr. Bradford: Objected to as an improper question, not being cross-examination, and being wholly immaterial and irrelevant.

By Mr. Rawle: Mr. Rawle calls attention to some evidence of the witness on the question of substitution.

A. If I understand your question correctly, we have not, because you have got the formula wrong.

X Q. 43. Give the correct name of the Lilly product?

(Objection repeated.)

A. We quote a price on a sugar coated tablet containing two grains each of calomel, rhubard and colocynch compound, which tablet, according to my best knowledge and belief will be found amongst the formulæ of the N. F. or U. S. P. and which is made and sold by divers and sundry pharmaceutical manufacturers.

X Q. 44. Who made and marketed the original compound of these ingredients?

(Objection repeated.)

A. I am unable to say.

X Q. 45. Was Lilly the first house to put this preparation on the market?

(Objection repeated.)

A. I don't know.

X Q. 46. Have you never heard of "Tabloid, Calomel, Rhubard and Colocynch Compound," made by Burrows, Welcome & Co., of England, or seen it?

364

(Objection repeated.)

A. Yes, I have heard of them, just as I have heard of pill compound cathartic made by Sharpe & Doehme.

X Q. 47. Are you familiar with the size and shape of the tabloids in the Burrow's preparation?

By Mr. Bradford: Objection repeated, and attention of the court is again called to the flagrant violation of counsel's right to cross-examine outside of the court on a line which has no bearing whatever on anything developed in direct-examination, and clearly for the purposes of attempting to justify some theory of the defendant's case.

(Mr. Rawle refers to the witness's testimony as to "substitute.")

A. Not any more so than I am with the sugar coated tablets made by other manufacturers.

X Q. 48. Don't you know that they are the same size and shape as the Lilly similar tablets?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant; counsel inquiring about a pharmaceutical preparation common to all since memory of man runneth not to the contrary.

A. I don't know that they are the identical size and shape at all.

X Q. 49. Aren't they substantially the same size and shape?

(Objection repeated.)

A. They are about the same size and shape just as the half grain calomel tablets made by other manufacturers.

X Q. 51. You have said something about "replacer" and "substitute." If the Burrowes calomel tabloid was the first on the market and the Lilly tablet followed it would you say that the Lilly tablet was a replacer or substitute for Burrowes'?

365

Objection repeated.

A. No more than I would say that any standard pharmaceutical product made by a competing house would be a substitute one for the other.

X Q. 52. Do you know of Hayden's Viburdum Compound or a preparation of substantially that name?

Same objection.

A. Yes, I know of a semi-patent or proprietary article which is sold under the name of Hayden's Viburdum Compound.

X Q. 53. Hasn't Lilly in its list a preparation called substantially Elixir Viburdum Compound?

Same objection.

A. They have.

X Q. 54. Do you consider Lilly's as a replacer of Hayden's?

Same objection.

A. I do not.

X Q. 55. Why not?

Same objection.

A. Because it is not alike in color, odor, or taste, the same as H. V. C. The formula of Hayden's Viburdum Compound is a hidden formula which no competing manufacturer knows nor are they in position to make a piece of goods so nearly like in its physiological action, as to take the place of H. V. C. I would say further that there is a piece of goods manufactured by William R. Warner that in odor, color, and taste is so nearly like Hayden's Viburdum Compound in its general appearance that it is used in a number of places as a substitute remedy for Hayden's Viburdum Compound.

366 By Mr. Rawle: The last part of the answer is objected to as volunteered.

X Q. 56. Isn't Lilly's Elixir Viburdum Compound intended to take the place of H. V. C.?

Same objection.

A. Elixir of Viburdum Compound, Lilly, is an open formula, printed upon its label, bearing the quantitative ingredients contained therein and is sold to be dispensed upon its merits.

X Q. 57. And you would recommend it to a druggist as a suitable remedy in cases where H. V. C. would be suitable?

Same objection.

A. I have stated in my previous answer that this item was distinctive in its odor, color and taste, so completely so that it could not be used as a substitute for H. V. C.

X Q. 58. X Q. 57 repeated.

Same objection.

A. I would not.

X Q. 59. Why not?

Same objection.

A. For the reasons stated.

X Q. 60. Do you understand that odor, color and taste in a medical preparation have anything to do with medicinal value necessarily?

A. Not necessarily with its medicinal value, but frequently odor and taste has a great deal to do with the patients being able to retain the medication when given internally.

X Q. 61. About how often do you call on each druggist in your district, approximately?

A. As nearly as possible every sixty days.

X Q. 62. By detailing physicians do you refer to having a drug salesman visit a physician and explain to him the virtues of his line of goods or some of them?

367 A. Detailing to a physician from a pharmaceutical point of view means the exploiting of specialties and talking the individual merits of the particular preparation when it is introduced to the physician?

X Q. 63. You have testified, X Q. 18, that the Lilly house has no quantity prices. Is that correct?

A. That is absolutely correct.

X Q. 64. Do you know Lilly's prices?

A. I guess I do.

X Q. 65. Do you know the price of Fluid Extract of Cascara?

A. Yes, I do. The Fluid Extract of Cascara in single pounds is $1.20 a pound net. In one gallon quantities, bulk, $4.95. In five gallon packages, bulk, $3.60 per gallon net. To all alike, large or small who engage in the retail drug business.

X Q. 66. Is the price for one gallon eight times the price for one pound?

A. I have given you the prices there.

X Q. 67. Question repeated.

A. The prices on bulk goods does not mean quantity prices. The price on one pound of any item net, would be the same as one hundred one pounds in individual packages. The same way with gallons and five gallons.

X Q. 68. Have you a price on a dozen packages of soda mint tablets?

By Mr. Bradford: Objected to as absolutely immaterial and irrelevant.

A. We have.

X Q. 69. Have you a gross price?

Same objection.

A. We have.

X Q. 70. Is it twelve times a dozen price?

Same objection.

A. It is not. But this gross price applies to all retail drug-
368 gists alike, large or small, regardless of their buying ability.

Cross-examination closed.

Deposition closed.

ANTHONY FLY.

Subscribed and sworn to before me this 8th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at 5.30 p. m. today at Collins, Miss.

Collins, Miss., April 8th, 1915—5.30 p. m.

Met pursuant to adjournment.

Parties present as before.

ELLIS B. STOVALL, a witness called by and on behalf of the plaintiff, being first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Ellis B. Stovall; age 30; Collins, Miss.; retail druggist; proprietor of Stovall's Pharmacy, in Collins, Miss.
Q. 2. Do you know anything about a pharmaceutical preparation known as Coco-Quinine, and if so, when did you first know of it and whose product is it?
A. Yes, I have known of it six or seven years, ever since I
369 have been in the drug business. It is Eli Lilly & Co. product.
Q. 3. Did you ever handle it in your store?
A. Yes, sir.
Q. 4. Do you handle Eli Lilly & Company's Coco-Quinine now?
A. I have handled it, but I have not bought any for the last two or three years.
Q. 5. Do you receive calls for Coco-Quinine?
A. Occasionally.
Q. 6. What do you fill these calls with?
A. If I have Coco-Quinine I give them Coco-Quinine and if I don't, I give them Quin-Coco, because I regard it as practically the same.
Q. 7. Do you always explain to the physicians when they ask for "Coco-Quinine" and you give them Quin-Coco, what preparation they are getting?
A. No, I don't do that.
Q. 8. Do you always explain to the physicians when you receive physicians' prescriptions for Coco-Quinine?
A. I do if he specifies Lilly's. If he don't specify Lilly's, I fill it with Quin-Coco without any explanation.
Q. 9. Why do you consider Quin-Coco the same as Coco-Quinine? On whose representations and statements?
A. All I have to go by is the formula on the bottle.
Q. 10. Did any one ever tell you that Quin-Coco was the same as Coco-Quinine?
A. I don't know that I have ever had them tell me it was the same, but said it was practically the same.

Q. 11. Did they ever tell you it could be used to supply the demand of Coco-Quinine?

A. They said I could use it as Coco-Quinine.

X Q. 12. Who told you this?

A. Warner & Company's representative, Mr. B. F. Jones.

370 Q. 13. Did you buy the Quin-Coco on such representations and dispense it accordingly?

A. Yes, I guess I did. I bought it because they both contained the same amount of quinine, as quinine was what they were after and both were tasteless preparations, and I considered that I was giving them what they were asking for.

Direct-examination closed.

ELLIS B. STOVALL.

(This deposition was taken during the temporary absence of Mr. Rawle, counsel for defendant, due to automobile trouble of the machine in which he was riding from Laurel to Collins, and after waiting for his arrival until nearly time for the train to leave for Gulfport, according to our schedule the deposition is closed subject to producing the witness for cross-examination at a later date and subject to any objections which Mr. Rawle may desire to place of record, to have the same force and effect as if made at the time the direct-examination was made.)

Subscribed and sworn to before me this 8th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

O. S. MAYFIELD, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. O. S. Mayfield; age 33; Collins, Miss.; retail druggist; proprietor of the Collins Drug Company.

Q. 2. Are you familiar with a pharmaceutical prepara-

371 tion known as Coco-Quinine, and if so, whose product is it and how long have you been familiar with it?

A. I am familiar with it and it is the product of Eli Lilly & Co., and we have been handling it for three or four years or more.

Q. 3. Have you ever been offered a product known as Quin-Coco, and if so, by whom and on what representations?

A. Yes, I was offered it by Mr. B. F. Jones, of Warner & Co. and the Pfeiffer Chemical Company. I cannot say the exact language used, but it was offered me as a cheaper preparation than Coco-Quinine and one that could be used for the same purpose, as similar preparation to Coco-Quinine.

Q. 4. Did you buy it?

A. No, I don't think we have ever bought any.

O. S. MAYFIELD.

Subscribed and sworn to before me this 8th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

(This deposition was taken during the temporary absence of Mr. Rawle, counsel for defendant, due to automobile trouble of the machine in which he was riding from Laurel to Collins, and after waiting for his arrival until nearly time for the train to leave for Gulfport, according to our schedule the deposition is closed subject to producing the witness for cross-examination at a later date and subject to any objections which Mr. Rawle may desire to place of record, to have the same force and effect as if made at the time the direct-examination was made.)

(Mr. Rawle arrived later.)

By Mr. Rawle: Mr. Rawle, having read the depositions has no cross-examination.

372 He objects to Q. 6, Q. 7 and Q. 8 of Stovall as irrelevant and as stating matter which is res inter alias acta.

Q. 10 is objected to as leading; also Q. 11.

Q. 13 is objected to as irrelevant.

As to Mayfield deposition no objections.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Mobile, Ala., tomorrow, Friday, April 9th, 1915, at 10.30 a. m., at the Battle House.

Mobile, Ala.,
Battle House, April 9th, 1915.

Met pursuant to adjournment.

Parties present as before.

SAMUEL H. COLVIN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Samuel H. Colvin; age 37; Mobile, Ala.; wholesale drug business. Manager of Van Antwerp Wholesale Drug Company, Incorporated, of Mobile, Ala.

Q. 2. What territory does your jobbing business cover?

373 A. Our territory is limited to a territory tributary to Mobile, I should say from a hundred to a hundred and fifty miles on the various roads and rivers leading out of Mobile.

Q. 3. Do you handle a product known as Coco-Quinine, and if so, whose product is it?

A. Yes, sir, we do; Coco-Quinine made by Eli Lilly & Co. We handle quite a bit of it.

Q. 4. Do you handle a product called Quin-Coco?

A. We do not.

Q. 5. Have you ever had a call from the retail trade for Quin-Coco?

A. I don't remember of having had a single call since I have been manager of the wholesale department for about six years, last past.

Direct-examination closed.

No cross-examination.

Deposition closed.

S. H. COLVIN.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EDWIN R. ALBRIGHT, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edwin R. Albright; age 31; Mobile, Ala.; retail druggist; partner in the firm of Albright & Wood, located at Dauphin and Jackson Sts., at Government and Royal and St. Francis Streets, Mobile, Ala.

374 Q. 2. Does your firm handle a pharmaceutical product known as Coco-Quinine at these several stores, and, if so, whose product do you recognize it to be?

A. Yes, we handle it. It is the product of Eli Lilly & Co.

Q. 3. How long have you been familiar with this product?

A. About twelve years.

Q. 4. Did you know of any other syrup of quinine colored and flavored with chocolate before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No.

Q. 5. How is this product dispensed at your stores?

A. On prescriptions and also on calls for it. We put it up in our own bottles and label it.

Q. 6. Do your stores do a considerable prescription business?

A. Yes, sir.

Q. 7. How are prescriptions for Coco-Quinine written by physicians usually?

A. They simply write "Coco-Quinine."

Q. 8. Whose product do you understand is intended when prescriptions are received so written?

A. Eli Lilly's.

Q. 9. Have you ever received a prescription at either of your stores so far as you know written for "Quin-Coco"?

A. No.

Q. 10. Have you ever had a call so far as you know from a customer for "Quin-Coco"?

A. No.

Q. 11. Do you know anything about the product called "Quin-Coco," and if so, what can you tell us concerning it?

A. I have seen it. It looks very much like Coco-Quinine.

Q. 12. Has it ever been offered to you for sale, and if so on what representations?

375 By Mr. Rawle: Objected to as improper and as not calling for the conversation.

A. It has been offered to me as being the same as Coco-Quinine. That's about all.

Q. 13. By whom was it offered to you?

A. By a representative of the Pfeiffer people, a Mr. Jones. I have known him for many years, but do not know his initials. He also represents the Warner line.

Q. 14. Do you buy other goods from Mr. Jones?

A. Yes, sir.

Q. 15. What is the name of the firm on the invoices you receive?

A. It used to be Pfeiffer, but it is now William R. Warner & Co.

Q. 16. How was it expected that you would sell Quin-Coco when you receive no calls or prescriptions for it?

By Mr. Rawle: Objected to as improper and as not calling for a statement of what was said but for expectations, and because the witness has already testified on the subject in answer to Q. 12.

A. I don't know how he expected me to sell it other than to use it for Coco-Quinine.

Q. 17. Was that your understanding of the proposition?

By Mr. Rawle: Objected to as not calling for the conversation and because the witness has fully testified in answer to Q. 12 and as leading.

A. I naturally understood it that way, when he told me it was the same thing as Coco-Quinine.

Q. 18. Was anything said about the price?

A. Yes, sir, the price was considerably lower than Coco-Quinine.

Q. 19. Have you ever sold Quin-Coco either at your present stores or elsewhere?

A. I have never sold it at my present stores, but sold it when I was previously employed.

376 Q. 20. In response to what demand did you sell it where you were previously employed?

By Mr. Rawle: Objected to as irrelevant and as res inter alios acta.

A. To demand for Coco-Quinine, and on prescriptions for Coco-Quinine.

Q. 21. Were the customers and physicians advised that they were getting Quin-Coco instead of Coco-Quinine, when these transactions were made?

(Same objection.)

A. No, sir.

Q. 22. Do you ever receive calls from customers for "chocolate quinine," and if you do, what product do you understand is intended?

By Mr. Rawle: Objected to as irrelevant.

A. We very rarely receive such calls, but when we do we understand that they want Coco-Quinine.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

XQ. 23. You mean, I take it, that when a customer calls for "chocolate quinine," that your stores, carrying no other chocolate quinine than Coco-Quinine, sell the customer, Coco-Quinine? Is that correct?

A. Yes, sir.

X Q. 24. Do men, women and children of all ages and conditions sometimes purchase a chocolate quinine preparation?

A. Yes, sir.

X Q. 25. Briefly what is the difference between cocoa and chocolate?

A. None that I know of. I consider them the same.

X Q. 26. Having in your mind drug stores and candy
377 stores, what is the popular and usual name employed for chocolate or cocoa? Isn't it chocolate?

A. I don't think so any more than cocoa.

X Q. 27. Do you think a girl goes into a candy store and asks for some cocoa candy?

A. No. I run a drug store; I don't know anything about what they do in candy stores. I do sell candy in boxes and packages only.

X Q. 28. Are your chocolate candies labeled "chocolate" or "coc-a", for instance Hershey or Peters, &c.?

A. Candies are labeled chocolate but we carry Hershey's cocoa.

X Q. 29. And Hershey's chocolate, also.

A. Yes, sir.

X Q. 30. Don't you think that on the whole chocolate is decidedly the popular name for that article?

A. Yes, sir.

X Q. 31. If that is the popular name for the article, don't you think that a good many customers in calling for a chocolate quinine

preparation call for it by that name, or substantially so. That is, by the name of "sweet quinine," or "tasteless quinine" or "syrup of quinine," but without giving the article called for a trade mark name?

A. I don't exactly understand what you are trying to get at there. You will have to make it a little clearer.

X Q. 32. Haven't you said that "chocolate" is on the whole the popular name for an article sometimes called "chocolate" and sometimes known as "cocoa"?

A. Yes.

X Q. 33. That being the case I ask you whether you do not often have calls for "chocolate quinine," or "tasteless quinine," or "sweet quinine," or "syrup of quinine," or some other similar name, the customer not calling for the article by its exact trade mark name?

A. Yes, sir.

X Q. 34. Don't you believe that it is called for in some such way about half the time?

378 A. No, sir, I should think about probably one-tenth maybe.

X Q. 35. All the other calls give the exact trade name of the article, is that correct?

A. Yes, sir.

X Q. 36. What trade name?

A. "Coco-Quinine."

X Q. 37. How many prescription clerks are usually on duty, including the partners at your various stores?

A. Six.

X Q. 38. Haven't you on your shelves any medicinal preparations which you consider similar in medicinal effect and which so far as your pharmaceutical judgment is concerned could perfectly well be used one for the other and with the same medicinal effect?

By Mr. Bradford: Objected to as improper not being cross-examination and as wholly irrelevant and immaterial to any issue herein.

By Mr. Rawle: I call attention to Q. 16.

A. We have numbers of them that could be used with the same medicinal effect. I would consider a two grain quinine capsule to have the same medicinal effect. There is no similarity in the looks or taste.

X Q. 39. How about listerine and similar products of other drug concerns?

(Same objection.)

A. How about it?

X Q. 40. Do you carry listerine in stock?

(Same objection.)

A. Yes, sir.

X Q. 41. Do you carry any other similar preparation, and if so, give the name and the maker's name or names?

(Same objection.)

379 A. We carry Wampole's Formolid, manufactured by H. K. Wampole & Co., Philadelphia, which is a similar preparation. However the formula is different.

X Q. 42. Do you carry or do you know of any other preparation similar to listerine? If, so, give the name and the maker's name?

(Same objection.)

A. I don't know of any more.

X Q. 43. Do you know of Lilly's Eucalyptus and Thymol Compound?

(Same objection.)

A. No, sir.

X Q. 44. Wasn't listerine on the market long before the Wampole product?

By Mr. Bradford: Same objection. The attention of the court is further asked to the flagrant abuse of the privilege of cross-examination by counsel for defendant and the total waste of complainant's time with such improper and irrelevant interrogatories at this stage of the proceedings.

A. I do not know, they were both on the market when I started in the drug business.

X Q. 45. Assume that listerine had been on the market and well known before the Wampole product was put on the market, and assume that they are similar preparations. Would you consider that when a drug salesman, such being the case, in offering you the Wampole similar product meant to have you dishonestly pass it off on your customers when they called for listerine?

(Same objection.)

A. I don't care to answer that question. I can't assume such things.

X Q. 46. Don't you understand my question?

(Same objection.)

380 A. Not thoroughly. You seem to want my opinion.

X Q. 47. Can't you answer the question. It will be re-read to you.

(Same objection.)

A. My opinion is that if he stated that it was the same as listerine and could be used instead of listerine that that was his motive.

X Q. 48. I understand you to say that Jones told you that the price of Quin-Coco was considerably lower than Coco-Quinine and that it was the same thing as Coco-Quinine? Is that correct?

A. Yes, sir.
X Q. 49. And that is what he did say?
A. Yes, sir.
X Q. 50. Did he say anything else on that subject?
A. He said that he sold a lot of it all over his territory, to some of the best druggists.
X Q. 51. Is that all on that subject?
A. Yes, sir.
X Q. 52. Where were you previously employed?
A. At Ortmann's Pharmacy, in Mobile, Ala., from about 1901 to 1910, something like that, about nine years. Prior to 1901 I was employed by Floyd's Pharmacy, Phœnix, Ala., but I didn't sell Quin-Coco there.
X Q. 53. You have testified, as I understand it, that at Ortmann's drug store you did dispense Quin-Coco for Coco-Quinine to customers and on prescriptions in cases where the customers and physicians did not know that they were getting Quin-Coco instead of Coco-Quinine. Is that what you say?
A. Yes, sir.
X Q. 54. Is that the work of an honest druggist, do you now think?
A. No, sir. I didn't think so then.
X Q. 55. How long ago was that?
A. It lasted for nine years, it continued for nine years, I worked there nine years.
381 X Q. 56. Beginning when?
A. I don't know the exact date, I would have to figure it out. For the last five years I was at Ortmann's I did prescription work and that was the time I referred to, but before that I sold it over the counter.
X Q. 57. Sometimes on a call for a chocolate quinine preparation?
A. Yes, sir.
X Q. 58. When did you have the interview with Jones referred to in Q. 13?
A. Several months after going in business on my own account. And several times since then.
X Q. 59. And at each of these interviews he told you that Quin-Coco was a cheaper product than Coco-Quinine, and was about the same thing or a similar product. Is that right?
A. I don't remember whether he stated that the price was cheaper every time he offered it, but he always stated that it was the same preparation, and that a customer couldn't tell the difference.
X Q. 60. I understand that you have been connected with your present firm for three and a half years and previously to that did prescription work at Ortmann's for five years and that for several years prior to the pescription work at Ortmann's you dispensed Quin-Coco. Am I correct?
A. I don't just remember whether I dispensed it several years prior to that but I do remember that I dispensed it while at Ortmann's. I can't recall those dates. I can't go back there. I can't

figure it out. I can get them if you will give me a little time to do so.

X Q. 61. You have already said substantially as I have quoted. Are you now meaning to change your testimony?

A. Not at all.

X Q. 62. Then your first statement was correct as to your dispensing Quin-Coco for five years as prescription clerk at Ortmann's and selling it over the counter for certain years prior
382 to your doing prescription work there. Is that correct?

By Mr. Bradford: Objected to as not a fair statement of the witness's previous testimony and as an attempt to pin witness down to exact dates when he has already explained that he is unable to give them if counsel will give him a few minutes time to look up the data.

By Mr. Rawle: The objection is objected to.

A. I cannot be certain as to the dates but did dispense it before I was a registered prescription clerk. If you will allow me to look up my date of registration I can give you the exact date.

X Q. 63. For how many years did you dispense it over the counter before you put up prescriptions or before you were registered?

A. I don't know exactly.

X Q. 64. Three years?

A. I couldn't say exactly how long. I don't remember that has been so long ago.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 65. Suppose the fact to be that Quin-Coco was first introduced in the fall of 1907, would you say that you dispensed it prior to that time?

A. No, sir.

By Mr. Rawle: The question is objected to as leading.

R. D. Q. 66. What retail drug store of Mobile has the reputation of doing the largest prescription business of the city?

383 A. Van Antwerp Drug Corporation. There are about forty or fifty drug stores in Mobile. That includes the city and suburbs.

Deposition closed.

EDWIN R. ALBRIGHT.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

QUINTUS S. ADAMS, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age residence and occupation?

A. Quintus S. Adams; age, 25; Mobile, Ala.; Pharmacist in Van Antwerp Drug Company's Retail Department. I am the prescription clerk who handles all the prescriptions that come into the store, except the hours that I am off duty.

Q. 2. About how many prescriptions on the average are handled by your store per day?

A. Average the year around about 125 a day.

Q. 3. Won't you explain your duties at the store?

A. My duties are I have charge of all prescriptions that come in. I take them in and turn them out at the window, price them if necessary.

Q. 4. Do you receive prescriptions at your store for a product known as Coco-Quinine?

A. Yes, quite often.

Q. Do they come from various physicians and various localities throughout the city?

A. Yes.

Q. 6. How are these prescriptions written usually?

384 A. "Coco-Quinine" and the amount and directions.

Q. 7. Have you ever seen a prescription received at your store for a product called "Quin-Coco?"

A. No.

Q. 8. How long have you been looking after this work at this store?

A. About eight months, about six or eight months.

Q. 9. Have you inquired of other prescription clerks at the store, whether they have ever seen prescriptions for Quin-Coco, and if so, what did they say?

By Mr. Rawle: Objected to as hearsay.

A. I have and they say that they have never seen a prescription for it.

Direct examination closed.
No Cross-examination.
Deposition closed.

QUINTUS S. ADAMS.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

OSCAR J. MCMILLAN, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Oscar J. McMillan; age, 22; Prichard, Ala.; Proprietor of a Retail Drug Store, at Prichard, Ala. Prichard is a suburb of Mobile, Ala. I have been established there about three months. I have been in the drug business about five or six years and prior to es-
385 tablishing my present store was employed by Dr. N. S. Gay, at Whistler, Ala., another suburb of Mobile.

Q. 2. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so whose product is it?

A. Yes, sir, I do. It is Eli Lilly's product.

Q. 3. How do you dispense it?

A. On prescriptions and over the counter.

Q. 4. Did you ever hear of a product called "Quin-Coco," and if so, when and under what circumstances?

A. I heard of it through the William R. Warner & Company salesman, Mr. McCarty.

Q. 5. What did Mr. McCarty say to you on this subject?

A. He asked me if I didn't want some of their preparation Quin-Coco. I told him "No, we couldn't substitute." He told me it was all right, that it was the same thing as Coco-Quinine, that you couldn't tell the difference. And that it was the original preparation, brought out by a doctor who didn't have the money to back it up with advertising. And that in the meantime Lilly had put Coco-Quinine on the market and that then Warner brought out this Quin-Coco and put it on the market. He told me it wouldn't be substituting at all, that you couldn't tell the difference between it and Coco-Quinine. That is about all.

Q. 6. In what way did he tell you that it could be used or dispensed, that is, in response to what character of calls or demands?

By Mr. Rawle: Objected to as leading and because the witness has already answered as to the conversation.

A. As "Coco-Quinine."

Q. 7. What kind of calls for Coco-Quinine?

(Same objection.)

A. Either prescriptions or calls over the counter.

386 Q. 8. How are prescriptions written received at your store for "Coco-Quinine?"

A. "Coco-Quinine," just the name and the amount.

Q. 9. Whose product do you understand is intended by the physicians when they write prescriptions just "Coco-Quinine?"

A. Lilly & Company's.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 10. When was this talk with McCarty?
A. About the latter part of February, 1915. It was after I went into business for myself.
X Q. 11. While you were with Dr. Gay had you sold Quin-Coco?
A. No.
X Q. 12. Did you buy any Quin-Coco from McCarty?
A. No, sir.
X Q. 13. Did you buy any of the rest of his line?
A. Yes.
X Q. 14. Been dealing with him since?
A. Yes, sir.
X Q. 15. Think him an honest man?
A. I guess so, about as honest as the majority of the manufacturers.
X Q. 16. As honest as you are?
A. In the dealing that I had with him he was all right. We only bought patent medicines from him.
X Q. 17. Do you consider it honest for a druggist to dispense one preparation when another is called for without informing the physician or the customer?
A. No, as to that dealing with that Quinine-Coco I don't think they are.
X Q. 18. I repeat the question. I think you could answer it a little better. Please try. It is meant to be a general question on a moral subject in your business. You can answer it yes or no perfectly well.
387 A. No, sir.
X Q. 19. You say "McCarty was all right" in his dealings with you. Do you think he meant to make you a dishonest suggestion as to how you could use Quin-Coco?
A. Yes.
X Q. 20. Did he tell you it was a similar preparation to Coco-Quinine?
A. Yes, sir.
X Q. 21. And cheaper in price?
A. Yes, sir.
X Q. 22. And could compete in the market with Coco-Quinine?
A. Yes, sir.
X Q. 23. And that is about the substance of what he said to you?
A. Yes, sir.
X Q. 24. Do you say that he meant to make you a dishonest suggestion as to how you could sell Quin-Coco?
A. I would consider it dishonest if I sold it like he told me.
X Q. 25. I always understood that an imputation on the honesty of a southern gentlemen or a suggestion to him of a dishonest course would be severely resented. Am I correct?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. There are so many cases of that kind nowadays that you don't hardly look upon that as a thing of that kind.

X Q. 26. Then you mean that McCarty talked up his product in about the same way as the general run of drug salesman do?

A. He said more for his product, especially as compared with Coco-Quinine.

388 X Q. 27. Don't the drug salesmen all talk up their products, their specialty products?

A. They do, but they don't make a comparison between a substitute and a staple article as plain as Mr. McCarty did.

X Q. 28. In your experience have you known of customers calling for chocolate quinine preparation?

A. Very seldom.

X Q. 29. Men, women and children customers always pretty much come right out with the name "Coco-Quinine," do they?

A. The majority of them.

X Q. 30. How often does McCarty visit you?

A. He hasn't called since February.

X Q. 31. How many different items of his line did he talk to you about in February?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. About six.

X Q. 32. Don't you think you might possibly have misunderstood him as to any part of his talk which you consider contained a dishonest suggestion to you?

A. No, sir, we had quite an argument as to its merits when compared with Coco-Quinine.

X Q. 33. What did he says on its merits?

A. That it was the same as Coco-Quinine and could be dispensed without the doctor or patient detecting it, and that it cost us less money.

X Q. 34. And yet you didn't resent that suggestion?

A. No, sir.

X Q. 35. To whom did you first mention this interview with McCarty. I mean to what Lilly man?

A. Tisdale.

X Q. 36. When?

A. I told Tisdale about it about two weeks after McCarty's talk.

X Q. 37. How did you happen to tell him?

389 A. I just told him that McCarty had been out trying to sell me some more of that quinine preparation. This was just in the course of a general conversation.

X Q. 38. Is that all you told Tisdale?

A. I think so.

Cross-examination closed.

Deposition closed.

OSCAR J. McMILLAN.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

EMMET S. SHEPHERD, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Emmet S. Shepherd; age, 26; Mobile, Ala.; Pharmacist in the employ of Albright & Wood, Retail Druggists in Mobile, Ala. I am at their store No. 3, at St. Francis & Royal Sts. I am Prescription Clerk.

Q. 2. Do you handle a product known as Coco-Quinine and if so, whose product is it?

A. We do, the Coco-Quinine of Eli Lilly & Co.

Q. 3. How is this product dispensed at your store?

A. It is dispensed in pints, also in smaller fractions of a pint, also on prescriptions and on calls—over the counter.

Q. 4. Do you know anything of a product called Quin-Coco, and if so, tell us what you know of it?

A. I know of the product "Quin-Coco," manufactured by
390 William R. Warner R. Warner & Co. It has been used and dispensed for Coco-Quinine in places where I have formerly been employed, both over the counter and on prescriptions.

Q. 5. Is it used in the store where you are at present employed?

A. No product other than Coco-Quinine, Lilly's, is employed in the store of Albright & Wood.

Q. 6. Do you ever receive prescriptions for Quin-Coco?

A. I have no knowledge of ever receiving a prescription for Quin-Coco.

Q. 7. Have you ever had a customer ask for Quin-Coco over the counter?

A. I have never had a customer call for Quin-Coco over the counter.

Direct-examination closed.

Q. 4. Is objected to as hearsay and as res inter alias acta.

No Cross-examination.
Deposition closed.

EMMET S. SHEPHERD.

Subscribed and sworn to before me this 9th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, April 10th, 1915, at 9.30 a. m., at Marion Junction, Ala.

Marion Junction, Ala.,
April 10, 1915—9.30 a. m.

Met pursuant to adjournment.
Parties present as before.

391 O. C. TISDALE, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded by him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. O. C. Tisdale; age 31, Mobile, Ala., traveling salesman for Eli Lilly & Co. I cover Southwest Alabama and a portion of Southeast Mississippi. My duties are to visit druggists and dispensing doctors, soliciting business, and to detail physicians and dentists, introducing the Lilly pharmaceuticals to the medical profession.

Q. 2. Do you handle a pharmaceutical preparation known as Coco-Quinine, and can you tell us whether or not such preparation is in demand in your territory and the extent of the demand?

A. Yes, I handle the preparation called Coco-Quinine, and there is considerable demand for it.

Q. 3. Is this one of the preparations that has been detailed to the medical profession in your territory?

A. Yes, sir, very extensively.

Q. 4. Do you know anything about a product called Quin-Coco, and if so what can you tell us about it?

A. I see quite a good bit of it used in my territory, more so in some places than in others. The only thing I know about the preparation is that it is being used, as a good many of them say, as a substitute, and others will tell you that it is being used for "chocolate" quinine.

By Mr. Rawle: The answer is objected to as incompetent, and as hearsay, and as irrelevant.

Q. 5. You say that you see a good bit of it used in your territory. Please explain more fully as to what you mean by this?

Same objections.

392 A. I see it in drug stores, more frequently so than in the doctors' offices, dispensing doctors you might add, because prescription writers don't carry drugs.

Q. 6. You say "a good many of them say" and "others will tell you," whom are you referring to?

By Mr. Rawle: Objected to as calling for hearsay and as incompetent.

A. I am referring to the retail druggists and the proprietors of drug stores.

Q. 7. Please state what retail druggists have said to you on this subject?

By Mr. Rawle: Same objection and as res inter alias acta.

A. Offhanded I couldn't call off all the druggists that have told me that. It would take pretty good while to go over and state just

ow many had said it. I can recall several instances where we could o and get th se names and get the parties who have told me this.

Q. —. You seem to misunderstand my question. I didn't ask ou for the names of the druggists, I asked you for the statements f the druggists?

Same objection.

A. I suppose that fully ninety per cent. of them that handle Quin-Coco will tell me that they are handling it as a substitute for Coco-Quinine and that my preparation is too expensive. They also state that it is not necessary to pay us our price for Coco-Quinine when they can use Quin-Coco and the doctor nor the patient will never detect the difference. And I suppose in my territory that seventy-five per cent. of the druggists handle Quin-Coco, and I have never yet had one of them to tell me that he had received a prescription for it, or a call for Quin-Coco by the laity.

By Mr. Rawle: The objections to the question are repeated as to the answer and to the witness' statements of his suppositions
393 and his generalization.

Q. 9. Does the above statement fairly and correctly detail the character of statements with which your efforts to obtain orders for Coco-Quine are met in the proportion of the retail trade which you have referred to?

By Mr. Rawle: All of the above objections are made here and the objection that the question is inadmissible.

A. I don't quite get that question.

Q. 10. My question is: Is the statement you have just made concerning what many of the retail druggists have said to you on this subject, a fair summary of the statements with which your efforts to sell these druggists Coco-Quinine, are met?

By Mr. Rawle: Same objections as above.

A. I wouldn't like to make a statement unless I figured it out from a standpoint of going over my entire territory and taking every druggist that handles Quin-Coco and bring him out on this particular subject. It is so commonly used, it is so generally used amongst the retail trade, until some of them in ordering the preparation have oftentimes asked me for Quin-Coco. There are quite a number of them will ask me if my house prints labels for Coco-Quinine, that is, labels for dispensing as called for by the laity.

Q. 11. What purpose, if you know, have they in asking you this question?

By Mr. Rawle: Objected to as immaterial and for the above reasons.

A. To get new labels.

Q. 12. What do they want with new labels?

Same objection.

A. To keep a stock bottle.

394 Q. 13. Stock bottle of what?

Same objection.

A. Labeled "Coco-Quinine."

Q. 14. Won't you explain more fully and in detail just what you have in mind on this subject?

Same objection.

A. They do this to pour Quin-Coco into a Coco-Quinine bottle so the doctors will see the Coco-Quinine label and be led to believe that they are getting the genuine article "Coco-Quinine."

Q. 15. Won't you explain still more in detail just what the druggist does in this connection?

Same objections.

A. Well he pours the Quin-Coco into different sized packages and labels them "Coco-Quinine" to deceive the public.

Q. 16. Have any druggists told you why they label this "Coco-Quinine" instead of using its true name "Quin-Coco?" and if so what did they say on this subject?

Same objections.

A. I have had numbers of them tell me that if they would label it "Quin-Coco" they couldn't get the patient to take it, whereas if they label it "Coco-Quinine" a person would have no objection, they being very near the same color, consistency and taste.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. To make clear your use of the word "substitute" in this connection, and in your business, will you please define it?

A. The word "substitute" is to get a call for one thing, for in-

395 stance "Coco-Quinine," and give them, for example, "Quin-Coco," as it is the same taste, color and consistency without getting the doctor's consent or explaining to the laity when called for by the name "Coco-Quinine."

X Q. 18. You have apparently defined "substitution." Please define the noun "substitute" and state under what circumstances do you consider one preparation a substitute for another?

A. "Substitute" means something given in the place of or to take the place of and giving "Quin-Coco" when "Coco-Quinine" is prescribed or called for by the laity without an explanation would be called a "substitutor."

X Q. 19. Is that the only instance to which you would apply the word "substitute?"

A. That is about as clearly as I can make it in this instance.

X Q. 20. In the use of the word "substitute" do you differentiate between honest and dishonest acts?

A. Yes, sir.

X Q. 21. How?

A. Well, you wouldn't see the better class of druggists, the reputable druggists, substitute, because substitution is deception.

X Q. 22. I understand you now to mean that in a disreputable drug store Quin-Coco would be a "substitute" for Coco-Quinine, but in a reputable drug store it would not be. Is that correct?

A. That doesn't apply to all cases. You will find some disreputable druggists who will not substitute Quin-Coco for Coco-Quinine because the doctor has free access to his prescription department and this substitution is always kept from the doctor. In a number of instances I have known of a pint of Coco-Quinine to sit beside a gallon of Quin-Coco and you would see from eight to ten new bottles of Quin-Coco per year without seeing a new bottle of Coco-Quinine. This is done to deceive the practitioner when
396 looking for Coco-Quinine, and to present to the laity when they wished to see the label. I have two cases in mind where this has occurred quite recently and have been instructed to that effect. Then they also state that "you can't blame me for this, I am in business for dollars and cents."

By Mr. Rawle: The answer is objected to as volunteered and irresponsive, except as to the first sentence, as hearsay and as incompetent.

X Q. 23. Your answer to X Q. 21 is not responsive. I will ask you whether you mean that in a disreputable drug store which is in the habit of selling Quin-Coco for Coco-Quinine, if there be any such, Quin-Coco would be a "substitute" for Coco-Quinine, but in a reputable drug store it would not be. You will observe that I eliminate from X Q. 21 the case of the disreputable druggist who does not deal dishonestly in dispensing Quin-Coco?

A. You will not find Quin-Coco in what I consider a reputable drug store, because it is bought with the full intention of substitution, and a reputable druggist will not substitute.

X Q. 24. You still fail to give me any clear idea of what you mean by "substitute" and the limitations of what you mean thereby. I will try to get your idea through an illustration. Take for instance Listerine. Do you carry a similar preparation called in substance Eucalyptus and Thymol Compound and would you consider it a "substitute" for Listerine?

A. I couldn't answer this question as I do not know the formulæs of either preparation. And furthermore, I am instructed by the officials of the main office to never use the word "substitute" or never offer anything or any preparation as a substitution. In fact I think I have that in writing.

By Mr. Rawle: Objected to as volunteered.

X Q. 25. Don't you know the formulæ of your Lilly preparations, Eucalyptus and Thymol Compound?

397 A. Offhand I do not.

X Q. 26. In your use of the word "substitute" would you apply it to Lilly's Syrup Hypophosphites, as compared with Syrup Hypophosphites (Fellows).

Q. We have about a dozen formulæ of hypophosphites. Offhanded I could not recall the formula of either.

X Q. 27. If a doctor or a druggist asked you if you had in Lilly's line a preparation similar to Syrup Hypophosphites (Fellows) what would you tell him?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant, as improper on cross-examination, as a plain attempt to lug into the record on plaintiff's time and at plaintiff's expense alleged evidence for defendant's case, and as wholly unjustified by the excuse that it is an effort to get witness' opinion of what is the correct meaning of "substitute" or "substitution," his opinion having been clearly and explicitly stated, beyond the possibility of any misunderstanding on the part of anyone.

A. I would tell him, "Doctor, we are not offering our preparation as a substitute, but we have quite a number of the syrups of hypophosphites from which you can get the therapeutic effect of the hypophosphites, sold under our own label, but that will be different in color and probably in consistency and taste. They are the originators of this preparation Fellows Syrup of Hyp*h*ophosphites and I am instructed by our company that I am not to offer any of our products or label as a substitute, as we consider ourselves the originators of our formulas." Furthermore, the medical profession will maintain a higher respect for a representative who answers the question in this way.

X Q. 28. But which of your hypophosphites would you offer him?

By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant.

398 A. In a question under this condition I would hand him my book of formulas and let him make his own selection.

XQ. 29. Now I want to ask you whether if he selected a Lilly hypophosphite and had in stock a Fellows hypophosphite, you would consider those two preparations as a substitute one for the other, and if that is what you mean among other things by "substitute"? I have in my mind a druggist rather than a doctor.

Same objection.

A. I have never had a druggist to ask me for a formula of that kind.

X Q. 30. You have said that you told the doctors that Lilly was the originator of all the formulæ in the Lilly line. Would this apply to the Lilly Hinkle Pill?

By Mr. Bradford: Objected to for the reasons before stated and as not justified by anything that the witness has before said.

A. I couldn't say because there are one or two formulas that we purchased, for instance, Success Alterans, McDade Formula.

X Q. 31. How many retail drug stores are there in your territory, approximately?

A. Approximately about two hundred and fifty.

X Q. 32. How many doctors?

A. I would hate to say unless I took time to figure out. I would say approximately five hundred.

X Q. 33. I understand you to say that about seventy-five per cent of the druggists in your territory handle Quin-Coco and that about ninety per cent of that seventy-five per cent practice "substitution," which you say is dishonest in a druggist. Is that correct? I mean "substitution" of Quin-Coco for Coco-Quinine.

A. That is correct.

X Q. 34. Are you willing to give the names of the ninety per cent of the seventy-five per cent?

A. That would be impossible offhanded.

399 X Q. 35. You couldn't give any of them, or a third of them, or a tenth of them?

A. I can go over the territory and give you ninety per cent. that are handling it, for the simple reason that I have free access to every prescription department in my territory, but wouldn't like to give it offhanded without stopping to figure or even to observe it closer.

X. Q. 36. How many druggists in ordering the Lilly preparation of chocolate quinine from you have oftentimes asked you for Quin-Coco?

A. I have two in my mind at present.

X Q. 37. Any more?

A. Not that I know of at present.

X Q. 38. Do you think there were more?

A. I don't know of any more.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 39. Is it or is it not true that many pharmaceutical preparations are manufactured from the same formula, taken from the U. S. P., or the N. F., in common by various manufacturers?

A. That is true.

Deposition closed.

O. C. TISDALE.

Subscribed and sworn to before me this 10th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet this afternoon at 3.30 at Cuba, Ala.

400 Cuba, Ala., April 10th, 1915—3.30 p. m.

Met pursuant to adjournment.
Parties present as before.

AMOS L. VAUGHAN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Amos L. Vaughan, age 51, Cuba, Ala., physician and druggist, member of the firm of Vaughan & Vaughan, retail druggists, of which firm I am the sole owner at present.
Q. 2. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so, how long have you handled it approximately, and whose product do you recognize it to be?
A. I do. I have handled it about twelve years. I recognize it to be the product of Eli Lilly & Co.
Q. 3. Did you know of any similar liquid quinine chocolated preparation before Eli Lilly & Co. introduced Coco-Quinine?
A. I did not.
Q. 4. How do you dispense Coco-Quinine?
A. I dispense it over the counter as called for by prescriptions, or as prescribed by myself, or as called for by customers.
Q. 5. Do you know anything about a product called "Quin-Coco" and if so, what can you tell us about it?
A. I don't know anything about it. I never handled it. I never used any of it at all.
401 Q. 6. Has it ever been offered to you for sale, or an order for it been solicited at your store?
A. Yes, sir; it has.
Q. 7. By whom?
A. I don't know the man's name. I am a very poor hand to remember names. He was the traveling man for Warner & Co. I don't remember his name. I don't know his name.
Q. 8. Did you buy any other items of the Warner line from him?
A. I did. I bought a few articles, not that, but something else.
Q. 9. What did he say to you about Quin-Coco?
A. Well, the conversation came up about this way: He asked me how my stock was of Coco-Quinine, and I told him I had plenty on hand. He then told me he would like to demonstrate to me and show me a preparation of Quin Coco. I told him it would be useless because I had plenty on hand of Coco-Quinine, and was not in the market for substitutes and I had plenty of Coco-Quinine on hand. He told me that he would like for me to look at it as he wanted to demonstrate it to be as the same color, consistency was the same, and was guaranteed to have the sulfate of quinine the same amount, as the Coco-Quinine made by Lilly & Co.

Q. 10. How did he propose to make the demonstration as to its color and consistency?

A. He just told me that if I would get him a piece of white paper he would pour some out and see if I could tell the difference between the two, and I told him that that was useless because I was not in the market for quinine of any kind.

Q. 11. You mean he proposed to pour some of each product on a white paper for comparison?

A. I couldn't answer what he meant. I don't know about that.

Q. 12. What was it that he proposed to you to pour out on the white paper?

402 A. That was a little vial that he had that was labeled "Quin-Coco." I cut him off right there and that was the end of it.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 13. What is the population of this town?

A. Six hundred and fifty is my recollection at the last census, about six hundred and fifty. That is inside of the corporate limits.

X Q. 14. How many drug stores?

A. Two.

X Q. 15. When did this traveling man call on you?

A. I can't answer that question direct; I think it has been about ninety days ago, possibly a hundred and twenty. I might get the exact date by looking at my bill, because I bought some other stuff at the time.

Cross-examination closed.

Deposition closed.

AMOS L. VAUGHAN, M. D.

Subscribed and sworn to before me this 10th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Birmingham, Ala., Monday, April 12th, 1915, at 10 A. M.

Birmingham, Alabama,

Tutwiler Hotel, April 12th, 1915—10 a. m.

Met pursuant to adjournment.
Parties present as before.

403 FRED R. DALY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Fred R. Daly; age 36; Boyles, Ala.; a suburb of Birmingham Ala., retail druggist, proprietor of Boyles' Pharmacy.

Q. 2. Are you familiar with a pharmaceutical product known as Coco-Quinine and if so how long have you been familiar with it and whose product do you recognize it to be?

A. I am familiar with it and have been acquainted with it for about twelve years. I recognize it to be the product of Eli Lilly & Company.

Q. 3. Do you handle the same at your store?

A. I do.

Q. 4. How is it dispensed?

A. It is dispensed on prescriptions as Coco-Quinine. It is dispensed just on demand chiefly as "chocolate quinine." We never dispense it in original bottles, but in our own bottles under our own labels.

Q. 5. Have you ever received a prescription written for "Quin-Coco"?

A. Not that I remember of.

Q. 6. Have you ever had a call over the counter for Quin-Coco?

A. Not under that name.

Q. 7. How do the physicians write their prescriptions for this product?

A. "Coco-Quinine."

Q. 8. Do you handle the product called Quin-Coco and if so, from whom do you buy it?

A. I do handle it and I buy it from W. R. Warner.

Q. 9. What is the name of the Warner salesman from whom you have purchased Quin-Coco?

404 A. I don't remember the name of the salesman I bought the last from.

Q. 10. Have you bought any from Mr. Plaisance?

A. I don't recall buying any Quin-Coco from Mr. Plaisance.

Q. 11. Do you buy other Warner preparations from Mr. Plaisance?

A. I have.

Q. 12. The Mr. Plaisance who is present in the room now?

A. Yes, sir.

Q. 13. How do you sell the Quin-Coco?
A. On demand for "chocolate quinine."
Q. 14. What is your true belief of what a customer intends to ask for when asking for "chocolate quinine"?

By Mr. Rawle: Objected to as improper, as res inter alias acta, immaterial and incompetent.

A. Nearly always I think they mean "Coco-Quinine."
Q. 15. How do you label your bottles of Quin-Coco you sell over the counter?
A. Sometimes "Coco-Quinine" and sometimes "chocolate quinine."
Q. 16. Did your customers ever call for "chocolate quinine" before you had Quin-Coco in your store?

By Mr. Rawle: Same objection.

A. I am sure they did. I don't recall any particular case though.
Q. 17. They had then become accustomed, at least some of them sometimes, to ask for Coco-Quinine by the name "chocolate quinine"?

Same objections and as leading.

A. Yes, sir.

Direct examination closed.

405 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 18. What proportion of the calls over the counter are for "chocolate quinine"
A. At least a half.
X Q. 19. Perhaps sixty per cent?
A. Well, I might say that, yes, sir.
X Q. 20. Might be seventy per cent?
A. I won't increase that percentage any more.
X Q. 21. How many drug stores are there in Boyles?
A. In Boyles proper, at present, only one. In Boyles and Inglenook, in the territory which I reach, there are three.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 22. How do your purchases of Quin-Coco compare, as to quantity, with your purchases of Coco-Quinine?

By Mr. Rawle: Objected to as immaterial and as res inter alias acta.

A. I buy about forty to fifty per cent of Coco-Quinine as I do of Quin-Coco. Up to two years ago I had not bought any Quin-Coco.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 23. How long has Mr. Plaisance been selling for Warner. Isn't it a year and a half?

A. I don't recall the exact length of time, a year or possibly a little over.

406 R. X Q. 24. What is approximately the population of the territory that you supply?

A. Approximately twenty-five hundred.

Deposition closed.

FRED R. DALY.

Subscribed and sworn to before me this 10th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Dr. EZRA H. WALKER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Ezra H. Walker, age 31, Birmingham, Ala., physician.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, will you state what you can in reference to it as a medical preparation?

A. Yes, sir; I am familiar with it. I consider it one of the best preparations of quinine in the market. I have used it for three years in my practice and find it an excellent form of preparation of quinine for use in the treatment of children. I could rely on it as containing two grains of quinine to the dram and think it is reliable in every respect.

Q. 3. Whose product is it if you know?

A. I know it is Lilly's product and when prescribing I mean Lilly's whether specifying Lilly or not.

Q. 4. How do you usually designate this preparation when you write prescriptions?

407 A. I usually just write "Coco-Quinine (Lilly)," but not always, sometimes I simply write "Coco-Quinine."

Q. 5. Do you know anything about any other syrup of quinine of chocolate character called "Quin-Coco"? If so, what do you know about it?

A. I just know there is such a thing. I have seen the preparation. I have seen it in the drug stores. That is about all I know about it.

Q. 6. Did you ever prescribe it?

A. No, sir.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 7. Is Coco-Quinine chiefly given to children?

A. Yes, sir.

X Q. 8. Approximately what proportion is given in the treatment of children and what proportion to adults?

By Mr. Bradford: Objected to as immaterial.

A. I don't know. I never give it to an adult.

X Q. 9. What do you give adults?

Same objection.

A. I prescribe quinine capsules for adult patients.

X Q. 10. Does the chocolate in the preparation make it attractive to children?

A. Yes, sir.

X Q. 11. Particularly so?

A. Yes, sir.

X Q. 12. Chocolate is rather a favorite flavor with children, is it not?

A. It is.

By Mr. Bradford: This line of examination is objected to as not cross-examination.

408 X Q. 13. How long have you been practicing medicine?

A. Three years.

X Q. 14. Do you ever dispense drugs to your patients?

By Mr. Bradford: Objected to as immaterial.

A. Yes, sir.

X Q. 15. What proportion of your patients?

A. I guess half of them. I am associated with a drug store.

X Q. 16. Do you dispense Coco-Quinine yourself?

A. Yes, sir.

X Q. 17. Apart from the drug store with which you are associated?

A. Yes, sir. My office is in the drug store, the Morgan-Winter Drug Store.

Cross-examination closed.

Deposition closed.

E. H. WALKER, M. D.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

DON J. BARBER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Don J. Barber, age 35, Birmingham, Ala., retail druggist, president of the Barber-Ramsuer Drug Company, of Birmingham, Ala.

409 Q. 2. Are you in the active management of the business?

A. I am.

Q. 3. Are you familiar with a pharmaceutical preparation known as "Coco-Quinine," and if you are, do you handle it at the store?

A. I am familiar with it and handle it at the store.

Q. 4. When did you first become familiar with it approximately, and whose preparation do you recognize it to be?

A. I have been familiar with Coco-Quinine for possibly ten years and it is known as Lilly's Coco-Quinine and I recognize it as their product.

Q. 5. How is this product dispensed at your store?

A. It is dispensed on physicians' prescriptions and also to customers on calls over the counter, put up in quantities prescribed or called for, properly labeled.

Q. 6. Are your prescriptions received from physicians generally or from only a few?

A. From physicians generally.

Q. 7. Please state how generally this preparation is prescribed by the physicians of Birmingham judging from the prescriptions received at your store?

A. I would say that the physicians generally prescribe it, as we receive a good many prescriptions for it from many different physicians.

Q. 8. How do the physicians usually designate the product on their prescriptions?

A. They generally prescribe "Coco-Quinine." They sometimes add the word "Lilly," but generally just the name "Coco-Quinine."

Q. 9. How do people ask for it over the counter?

A. They ask for "Coco-Quinine" generally, and occasionally "chocolate quinine."

Q. 10. So far as you know has your store ever received a prescription for a product called "Quin-Coco"?

A. No, sir.

410 Q. 11. Would a prescription written for "Quin-Coco" be likely to be called to your personal attention?

A. Yes, sir; it would.

Q. 12. Have you ever had a customer, so far as you know, ask for "Quin-Coco" over the counter?

A. No, sir.

Q. 13. Whose product do you understand is intended when a customer asks for "Chocolate Quinine"?

A. Eli Lilly's Coco-Quinine.

Q. 14. Why?

A. Well, Eli Lilly's Coco-Quinine is known as the original "coco-quinine" or "chocolate quinine," and the only one that I have ever dispensed or have ever seen, and is the preparation the customers have always been using. I would really be afraid to give anything except Lilly's Coco-Quinine, believing that I would be substituting and not supplying the customer with the article they desired, and in the case of a physician's prescription I would not dispense anything except Lilly's Coco-Quinine as I don't care to take the responsibility on my own shoulders of giving anything except what the physician specifies.

Direct examination closed.

Cross-examination, without waiving objections:

By Mr. Rawle: Q. 14 and answer objected to as res inter alias acta and as incompetent.

X Q. 15. Is "chocolate" or "cocoa" the popular and common name among the laity, old and young, for that article?

A. Coco-Quinine.

X Q. 16. What I mean is, does a child come in and ask for cocoa ice cream or does the child ask for chocolate ice cream?

A. Chocolate ice cream.

X Q. 17. When an ordinary customer old or young and
411 of different conditions in life, desires to buy at a drug store or at a candy store, whether it be ice cream or candy or soda water, something composed or partially composed of that which is indifferently called chocolate or cocoa, I ask you whether chocolate is not the popular and common name used by such laity?

A. Chocolate is the popular name, but hot chocolate is very often called cocoa.

X Q. 18. What do you mean by "hot chocolate." Where is it sold?

A. Over the counter of the soda fountain.

X Q. 19. Now in view of that fact what percentage of the laity, approximately, old, and young, and of all conditions, call for a "chocolate" quinine preparation, and what proportion use the precise trade name of the Lilly preparation?

A. To the best of my knowledge and belief about one per cent call for "chocolate quinine."

X Q. 20. How many calls do you have in each week, on the average?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. I could not give the number. Approximately twenty.

X Q. 21. And hardly one out of the twenty uses the popular name "chocolate." Is that correct?

A. The percentage would not run as high as one out of twenty.

X Q. 22. How large a business do you do approximately as compared with the general run of drug stores in this city?

A. It is of average size. It is not the largest and it is not the smallest.

X Q. 23. How many drug stores are there here?

A. About one hundred.

X Q. 24. Do you carry Quin-Coco in stock or have you ever carried it?

412 A. No, sir.

X Q. 25. Then I presume that your doctors are trained in the use of Coco-Quinine, are they not?

A. They prescribe Coco-Quinine.

Cross-examination closed.

Deposition closed.

DON J. BARBER.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

HILL W. HOWELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Hill W. Howell, age 29, Hamilton, Ala., physician, practicing medicine.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine and if so whose product do you recognize it to be?

A. I am. It is Eli Lilly's product.

Q. 3. Have you used it in your practice?

A. Yes, sir.

Q. 4. When did you begin using it?

A. Some three or four years ago. I wouldn't say positively about that.

Q. 5. How do you regard it as a pharmaceutical preparation?

A. I consider it first class. I think it is all right.

Q. 6. Are you familiar with a preparation called Quin-Coco and if so tell us what you know about it?

413 A. Yes, sir, I bought some one time. It seemed to be all right. I bought it from William A. Webster's man, his name was Mr. Martin. I asked for some Coco-Quinine and he told me he didn't sell Coco-Quinine, but that that was the same preparation.

By Mr. Rawle: The answer is objected to as hearsay and as res inter alias acta and as immaterial.

Q. 7. What else was said by Mr. Martin on this subject?

Same objection.

A. I don't remember. He told me that it was about ten cents a pint cheaper. I bought a five-pint bottle.

Q. 8. How was the bottle marked or labeled, if you remember?

A. Quinin-Coco. I am not absolutely sure that that is correct. It was not "quinine-coco," but I think it was "Quinin-Coco."

Q. 9. Anything else on the label?

Same objection.

A. I don't remember what was on the label. Searle & Hereth I believe was the name. I have the exact name in my pocket. It was Searle & Hereth or something like that. I am not exactly certain as to that name.

Q. 10. Have you also got the name of the product in your pocket as it was printed on the label?

A. No, sir, I haven't.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 11. What was the color of the label?

A. It was a yellow label.

X Q. 12. You say "Coco-Quinine" is all right as a pharmaceutical preparation. Is it the chocolate flavor that makes it attractive to customers and particularly children?

414

A. I suppose it is.

X Q. 13. Do you prescribe it mostly for children?

A. Yes, sir.

X Q. 14. And straight quinine for adults?

A. Usually, yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 15. Wouldn't some other flavor also be attractive to children, possibly?

A. Possibly, yes.

Deposition closed.

HILL W. HOWELL.

Subscribed and sworn to before me this 12th day of April, 19
CHARLES E. RIORDON,
Special Examiner.

Recess.

After Recess.

MERRILL P. NORTHINGTON, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Merrill P. Northington, age 39, Birmingham, Al
415 treasurer Doster-Northington Drug Company, wholesal druggists.

Q. 2. What territory does your house serve?

A. All of the northern half of Alabama and small parts of Georgi and Mississippi.

Q. Do you handle a general line of pharmaceuticals of most of th leading manufacturers?

A. Yes, sir.

Q. 4. Do you handle a product known as Coco-Quinine, and if yo do, whose product do you recognize it to be?

A. We handle Coco-Quinine. It is manufactured by Eli Lilly & Co. of Indianapolis.

Q. 5. How long have you known of this product?

A. Since we have been in business, which is about thirteen years.

Q. 6. Did you know of any other syrup quinine preparation col- ored and flavored with chocolate before Coco-Quinine was introduced by Eli Lilly & Co.?

A. No, sir.

Q. 7. What is the character of the demand for this preparation from the retail trade in your territory?

A. We have always had a good heavy demand for Coco-Quinine and have sold a good deal of it since we have been in business. We have had a continuous demand for it.

Q. 8. Have you ever received an order at your store for a product called "Quin-Coco," so far as you know?

A. Not within my knowledge, no sir.

Q. 9. If such an order were received would it be likely to be called to your attention?

A. I would be apt to see it as all orders pass through my hands when they come into the store.

Q. 10. Do you know anything about Quin-Coco.

A. No, sir. So far as I personally know I wouldn't have known that there was such a product on the market.

Direct examination closed.

416 Cross-examination.

By Mr. Rawle:

X Q. 11. Approximately how many drug stores are there in your territory?

A. I don't believe that I could answer that hardly. Approximately I would say there are four hundred drug stores in the territory that we cover. It is just a guess.

X Q. 12. Do you handle any of William R. Warner & Co. line?

A. We handle only their specialties.

Cross-examination closed.
Deposition closed.

MERRILL P. NORTHINGTON.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

By Mr. Rawle: Mr. Rawle places on the record at this point an objection to the accumulation of proofs along the same line at various points distant from each other and the taking of testimony at these points which entails long lines of travel by rail, the consumption of much time, and imposes much expense upon the defendant.

By Mr. Bradford: Mr. Bradford replied that much as he regrets the necessity he knows of no other way to present to the Court a comprehensive understanding of the facts governing the questions at issue in this cause.

417 AVINGTON C. FANCHER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Avington C. Fancher, age 34, Birmingham, Ala., traveling salesman for Eli Lilly & Co.

Q. 2. What territory do you cover?

A. North Alabama.

Q. 3. Approximately how many drug stores in your territory?

A. Approximately I should say about three hundred and fifty or four hundred. I hadn't thought of it before. This is my guess.

Q. 4. About how many physicians would you estimate in your territory?

A. Seven or eight hundred.

Q. 5. As I understand it your duties require you to call both on the druggists and the physicians. Is this correct?

A. Yes, sir.

Q. 6. What can you say about the sale of Coco-Quinine in your territory?

A. I sell quite a good deal of it. It is a very popular preparation and I sell quite a good deal of it. Practically every druggist in my territory has a demand for it and stock it.

Q. 7. What can you say about the sale of Quin-Coco to supply the demand for Coco-Quinine in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial, and as leading.

A. Well, I can say that there is quite a good deal of Quin-Coco sold in my territory?

Q. 8. How do you know?

418 A. Because I see it on the druggists' shelves.

Q. 9. Approximately what proportion of the druggists in your territory sell Quin-Coco?

A. I believe seventy-five per cent. of the druggists in my territory handle it.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 10. How often do you call on your druggists on the average?

A. Every thirty to sixty days.

Deposition closed.

A. C. FANCHER.

Subscribed and sworn to before me this 12th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Auesday, April 13th, 1915, at 10 a. m., at Montgomery, Ala.

Montgomery, Ala.,
Exchange Hotel, April 13th, 1915.

Met pursuant to adjournment.
Parties present as before.

TERRY T. GREIL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

419 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Terry T. Greil, age 39, Montgomery, Ala., wholesale druggist, member of Greil Brothers Company, of Montgomery, Alabama, wholesale druggists.

Q. 2. What territory does your house serve?

A. All of the southern part of Alabama, except Mobile territory

proper; southwest Georgia, as far south as Tallahassee, Florida, and north of Montgomery as far as Birmingham, and West Point, Georgia. And as far west as Columbus, Miss.

Q. 3. Does your house handle a general line of pharmaceuticals and solicit orders from the retail drug stores of this territory?

A. Yes, sir, we do.

Q. 4. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so, whose product is it?

A. Yes, and the same is manufactured by Eli Lilly & Co., of Indianapolis.

Q. 5. What character of demand do you have for this product in your trade?

A. We receive orders from the retail druggists. The demand for Coco-Quinine is very satisfactory and I should say quite large for a specialty, throughout the whole territory.

Q. 6. How long have you been handling this product?

A. As near as I can remember between eight and eleven years, practically ever since we have been in the drug business. We have been in business since June, 1903. I refer to our wholesale drug department.

Q. 7. Has your house since it has been in the jobbing drug business ever received an order for a product called "Quin-Coco"?

By Mr. Rawle: Objected to as immaterial.

420 A. Not as I remember or have been able to ascertain.

Q. 8. How do you regard the house of Eli Lilly & Co. and its preparations?

Same objections. Character evidence is not material to the issue.

A. I consider the house of Eli Lilly & Co. one of the most reputable that we have ever done business with and one of the most satisfactory and their reputation is beyond reproach, and I consider goods of their manufacture as good as any pharmaceutical house in the United States.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 9. Do you handle an entire line of Lilly's goods?

A. Yes, sir.

X Q. 10. Do you handle any other entire pharmaceutical line than Lilly?

A. Yes, but we do not handle it to the extent that we handle Lilly's, but we carry a very complete line of Sharpe & Doehme. We carry a fairly representative stock of Parke, Davis regular line and their specialties.

X Q. 11. To whose line do you give preference?

A. Eli Lilly's.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 12. Do you or do you not stock goods of any house for which there is any demand in your territory?

A. We always stock everything that we have sufficient calls for.

421 R. D. Q. 13. Regardless of the manufacturer?

A. Yes, regardless of the manufacturer.

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 14. Aren't there any products for which there is a demand in your territory but which you do not carry in stock? For example, Dr. Hobson's Toothache Drops?

A. We always try to carry in stock and supply the trade with everything that is called for when we have sufficient demand. In other words, whenever we feel like we are justified in putting in a proposition we always stock it.

R. X Q. 15. But there may be a demand for a preparation in your territory which demand is supplied through other drug houses, is that correct? I mean supplied by either manufacturers or other jobbers.

A. I suppose there is. I don't quite understand what you mean. There are some manufacturers who sell direct to the retail trade.

R. X Q. 16. I understand you to say that there are products in your territory for which the manufacturers have created a demand and supplied it themselves without your having an opportunity to supply that demand?

By Mr. Bradford: Objected to as not justified by the witness' testimony.

A. In cases where manufacturers sell direct to the retailer naturally they don't cater to the jobber.

R. X Q. 17. Who doesn't cater to the jobber?

A. Those manufacturers who sell direct to the trade.

R. X Q. 18. Can you now tell me whether there are products in your territory for which the manufacturers have created a demand and have supplied it themselves, without your having an opportunity to supply that demand? Can you answer this yes or no?

422 A. Yes.

R. X Q. 19. About how many drug stores are there in your territory?

A. From four to five hundred. That is just guessing.

R. X Q. 20. Are you confident there are over three hundred?

A. Yes.

R. X Q. 21. Would you be equally confident there are over four hundred?

A. I should say there is.

R. X Q. 22. Would you be surprised to know that there are over five hundred?

A. No, I wouldn't be surprised, because I have never given the actual count any serious consideration.

R. X Q. 23. How many are there in Montgomery and its suburbs?

By Mr. Bradford: Objected to as not cross-examination, as immaterial and irrelevant. Also the previous questions on this subject.

A. Between fifteen and twenty. I could count them exactly if you give me time.

Recross-examination closed.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 24. Have you ever stocked any of the products of William R. Warner & Co.?

A. Yes.

R. R. D. Q. 25. And supplied the products of this house for which there is any demand in your territory?

A. Yes.

Re-recross examination.

By Mr. Rawle:

R. R. X Q. 26. You surely don't mean to say that your house supplies to the retail drug trade all the line of William R. Warner goods for which there is any sale in your territory, or any demand? And that your house meets the entire demand for such Warner goods and supplies it?

423

By Mr. Bradford: Objected to as not re-recross examination, no question having been asked in re-redirect to any such purport.

By Mr. Rawle: Mr. Rawle calls attention to R. R. D. Q. 25.

A. We do not stock a line of William R. Warner's pharmaceuticals, but we do carry and sell all of their specialties and patent medicines that they are interested in that we have sufficient demand for.

R. R. X Q. 27. Isn't it true that most of the retail drug stores in your territory buy direct from Warner many items of the Warner line which they sell, for which a demand has been created?

A. Yes.

Re-re-redirect examination.

By Mr. Bradford:

R. R. R. D. Q. 28. Do you also carry the same Warner items and supply them to the trade when they are called for?

A. In many instances where the retailers ordering direct in order to make a shipment they include items that the jobber carries in stock.

R. R. R. D. Q. 29. Mr. Rawle asked you if it was not true that most of the retail drug stores in your territory buy many items of the Warner line direct from Warner. You answered "Yes." I now ask you if your house does not also supply these items to the retail trade when you have any demand for them?

By Mr. Rawle: Objected to as leading.

A. I answer this as I answered the former question that we always stock all items of everybody's manufacturer when we
424 have sufficient demand for them, including William R. Warner's.

Re-re-recross-examination.

By Mr. Rawle:

R. R. R. X Q. 30. I understand you to say that you do carry in stock some items of the Warner line. Is that correct?

A. Yes.

R. R. R. X Q. 31. But not all the entire Warner line?

A. No.

R. R. R. X Q. 32. Then there are items in the Warner line for which the Warner Company has created a demand in your territory, which items the retail druggists buy direct from Warner?

A. If we have received sufficient demand for any of these items we have or will stock them.

R. R. R. X Q. 33. Question repeated.

A. That is a fact.

R. R. R. X Q. 34. And it is equally true that there is a demand for some items of the Warner line in your territory which does not come to you as jobbers?

A. Yes.

Re-re-re-redirect examination.

By Mr. Bradford:

R. R. R. R. D. Q. 35. Do William R. Warner & Co. solicit orders from your house for their goods?

A. We buy lots of goods from them, but as far as their representative coming around, I don't know, as I don't do the buying.

R. R. R. R. D. Q. 36. What items of the Warner line do you carry as far as you can recall?

A. We carry B. B. B., Sloan's Liniment, Warner's Specialties, Hobson's Eczema Ointment, King's New Discovery, Harter's Tonis, Meade & Baker's Mouth Wash, the Searle & Hereth specialties.

425 Re-re-re-recross-examination.

By Mr. Rawle:

R. R. R. R. X Q. 37. Do you carry all of Searle & Hereth specialties?

A. I don't know how many they make, so I couldn't tell you. We only carry two or three.

Deposition closed.

TERRY T. GREIL.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

COLEMAN F. PEARSON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Coleman F. Pearson, age 37, Montgomery, Ala., physician.

Q. 2. In your profession do you use a pharmaceutical preparation known as Coco-Quinine, and if so how long have you used it and whose preparation do you recognize it to be?

A. I do use Coco-Quinine, I have used it approximately fifteen years, and I recognize it to be the product of Eli Lilly & Co.

Q. 3. How do you designate this product on your prescriptions?

A. "Coco-Quinine."

Q. 4. When so designated whose product do you intend the druggist to furnish?

426 A. Eli Lilly & Company's.

Q. 5. Do you regard this as a sufficient designation of the product to inform the druggist that you intend Eli Lilly & Company's product to be used?

A. I do.

Q. 6. Why do you consider this name alone as sufficient to designate the Lilly preparation?

By Mr. Rawle: Objected to with the other questions as immaterial and incompetent.

A. That is the only preparation on the market that I know to be manufactured by that name.

Direct-examination closed.

No cross-examination.

COLEMAN F. PEARSON.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN B. REID, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John B. Reid, age 28, Union Springs, Alabama, retail druggist, one of the proprietors of the City Drug Store.

Q. 2. In your business do you handle a product known as Coco-Quinine?

A. I do.

Q. 3. Whose product do you recognize it to be?

A. Eli Lilly & Company.

427 Q. 4. How long have you handled Coco-Quinine at your store?

A. In my store about four years, in all about nine years, ever since I have been in the drug business. I was with the Ravenscroft Drug Company about three years and with J. L. Paulk for about two and a half years, both stores in Union Springs, and I handled this product at both stores during the entire time as well as at my store.

Q. 5. How have you been accustomed to dispense Coco-Quinine?

A. I have been accustomed to dispensing it on calls and on prescriptions also, in quantities as called for or prescribed, properly labeled.

Q. 6. How do physicians so far as your experience goes, write their prescriptions for this product?

A. Coco-Quinine.

Q. 7. Whose product do you understand is intended by a prescription so written?

A. Lilly's.

Q. 8. Have you ever seen a prescription written for Quin-Coco?

By Mr. Rawle: Objected to as immaterial.

A. No, sir.

Q. 9. Have you ever had a customer ask for "Quin-Coco"?

Same objection.

A. No, sir.

Q. 10. Is Coco-Quinine prescribed generally by physicians whose prescriptions are filled at your store and at the stores where you have worked?

By Mr. Rawle: Objected to as immaterial and as res inter alias acta.

A. It is.

Q. 11. Do many people use this product where you have been serving them in the drug stores so far as you know?

428 A. They do.

Q. 12. Do you know anything about the product called Quin-Coco and if you do what can you tell us about it?

A. I do. It is a preparation manufactured by the Searle & Hereth Company. My first knowledge of it, it was represented to me to be the same as Coco-Quinine by Mr. McCarty, a Warner salesman. That was about three years ago.

Q. 13. As near as you can recall what did Mr. McCarty say to you on this subject?

A. To the best of my memory, it was about something like this: He asked me if I used very much Coco-Quinine. I told him that I used a good deal. He then said that he could save me some money on the product. He showed me the sample of Quin-Coco and made me a price of $3.50 a gallon, and I bought one gallon.

Q. 14. Did he tell you how you could sell it or dispense it, and if so, what did he say?

By Mr. Rawle: Objected to as leading.

A. He simply sold it to me as a product to take the place of Coco-Quinine, said that it contained the same amount of quinine and would take the place of Coco-Quinine.

Q. 15. In what way would it take the place of Coco-Quinine?

By Mr. Rawle: Objected to as incompetent.

A. It would have the same effect, that is Quin-Coco would have the same effect as Coco-Quinine.

Q. 16. You have already testified that you never had any demand for Quin-Coco; how did you expect or he expect for you to dispose of Quin-Coco if you had no demand for it?

By Mr. Rawle: Objected to as leading and as calling for an opinion, and as incompetent.

429 A. I gathered from his conversation at the time that I bought it, that I bought Quin-Coco, that I would have to sell is as a substitute for Coco-Quinine.

By Mr. Rawle: Answer is objected to as incompetent, and also because what the witness gathered from a conversation is not evidence.

Q. 17. Do you mean to supply the demand for Coco-Quinine?

Same objection and as leading.

A. I do.

Q. 18. Did you sell Quin-Coco in accordance with this understanding?

By Mr. Rawle: Objected to as incompetent and as leading.

A. Not entirely.

Q. 19. Please explain how you sold the gallon of Quin-Coco which you have stated you bought?

Same objection.

A. I sold Quin-Coco usually when I had calls for "chocolate quinine," and on a few occasions when I had calls for Coco-Quinine.

The answer is objected to as to the last clause as being res inter alias acta and as not affecting the rights of the defendant.

Q. 20. How had customers been accustomed to ask for Coco-Quinine prior to the time you bought this gallon of Quin-Coco?

A. Some called for "Coco-Quinine," some called for "chocolate quinine syrup," some called for "brown quinine syrup," and others called for "quinine syrup."

Q. 21. Whose product did you understand was intended by the customer when asked for by any of these names?

By Mr. Rawle: Same objection.

430 A. By questioning the customer I found that they wanted Coco-Quinine, Lilly.

Same objection to the answer.

Q. 22. Your customers then, or at least some of them, had been accustomed to call Coco-Quinine by these other names, prior to the time you stocked Quin-Coco? Is this so?

By Mr. Rawle: Objected to as leading and immaterial, and as res inter alias acta.

A. They had.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 23. When did you begin in the drug business?

A. I began in the drug business with Ravenscroft Drug Company about 1905.

X Q. 24. Approximately what proportion of your customers over the counter, men, women and children, who desire a sweet quinine, or a syrup of quinine preparation, call for "chocolate quinine"?

A. I judge about one per cent.

X Q. 25. Isn't chocolate a more common name in the mouths of the ordinary laity than cocoa?

By Mr. Bradford: Objected to as wholly immaterial and irrelevant.

A. I don't know.

X Q. 26. How often is such a preparation called for by such expressions as "tasteless quinine" or "sweet quinine"?

A. Very seldom.

X Q. 27. You believe then that nearly all the calls are by people who use the extract Lilly trade name of "Coco-Quinine"?

A. A large per cent of them are.

X Q. 28. What is the population of Union Springs?

431 A. Four thousand and fifty. It is about forty miles from Montgomery on the Central of Georgia Road. There are four white drug stores and two owned by Negroes.

X Q. 29. How long have you been doing business with Mr. McCarty, the Warner salesman?

A. I began doing business with Mr. McCarty shortly after I went into the drug business for myself in 1911, that is, in the City Drug Store.

X Q. 30. Have you been the buyer for your firm?

A. Yes, sir.

X Q. 31. How often did he call on you?

A. About twice a year.

X Q. 32. That is about eight times. At which of the calls did he take up the subject of Quin-Coco to which you have referred?

A. To the best of my recollection it was about the third call.

X Q. 33. And he hadn't mentioned Quin-Coco to you on the first two calls?

A. I don't remember.

X Q. 34. Did you buy any of his line at that third call?

A. I did.

X Q. 35. Is it considered the square thing for a druggist to pass off one preparation on a doctor's prescription for another?

A. No, sir.

X Q. 36. Or on a customer over the counter?

A. No, sir. I consider it substitution in either case.

X Q. 37. And you consider that substitution is not the part of an honest or ethical druggist.

A. It is not.

X Q. 38. Now, will you please run your mind back to that third call of McCarty and state just what each of you said. Try to give his exact words and your exact words?

432 A. I can't give the exact words. Mr. McCarty asked me if I sold much Coco-Quinine and I replied that I sold a good deal. Mr. McCarty then asked me if I wouldn't buy a preparation of chocolate quinine at a price considerably lower than that of Coco-Quinine, which contained the same amount of quinine in the same form and would answer every purpose of Coco-Quinine. Mr. McCarty then made me a price on five gallons of this preparation which I think was about $3.25 a gallon. He also made me a price in single gallon quantity of $3.50 per gallon delivered. I gave Mr. McCarty my order for one gallon.

X Q. 39. Have you now stated the entire conversation between you that day on Quin-Coco?

A. To the best of my recollection I have.

X Q. 40. And you can't think of anything else he said.

A. I cannot.

X Q. 41. On the "few occasions" when you sold Quin-Coco on calls for Coco-Quinine (Q. 19) I suppose you had a good reason for doing so, hadn't you?

A. That was when I first began dispensing Quin-Coco, when I dispensed it as Coco-Quinine, when I had been told by Mr. McCarty that Quin-Coco was exactly the same as Coco-Quinine, and believing what Mr. McCarty said, I dispensed it as such.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 42. Did your opinion change as to whether or not Quin-Coco was the same thing as Coco-Quinine?

By Mr. Rawle: Objected to as immaterial.

A. It did.

R. D. Q. 43. What was the reason for your change of view on this point?

Same objection.

433 A. I had one customer to whom I had sold Quin-Coco in place of Coco-Quinine, who came back with the bottle of Quin-Coco and stated that it had had no effect whatever on his little girl who had a slight spell of fever. I explained this difference in the two preparations to the customer and then went out and secured the same amount of Coco-Quinine to replace the Quin-Coco which I had previously sold him. This proved satisfactory and I changed my opinion. The bottle of Quin-Coco which I had furnished that customer I had labeled "chocolate quinine."

Deposition closed.

JOHN B. REID.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN M. MOSELEY, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows in response to interrogatories to him by counsel.

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John M. Mosely, age 42, Geneva, Ala., retail druggist, manager and part owner of McInnis Drug Company.

Q. 2. How long have you been in the drug business?

A. About twenty years, I have been with the McInnis Drug Company in my present position since 1910. For about seven years

prior to that time I was the senior member of the firm of
434 J. M. Moseley & Company, druggists, of the same town. These two concerns were consolidated in 1910. Prior to 1903 I was employed in other drug stores in Geneva.

Q. 3. Are you familiar with a pharmaceutical preparation known as Coco-Quinine?

A. Yes, sir.

Q. 4. How long have you been familiar with it?

A. I should say twelve years or more.

Q. 5. Whose preparation do you recognize it to be?

A. Eli Lilly & Company's.

Q. 6. Has it been handled at other stores where you have been associated and also is it handled at your present store?

A. Yes, sir.

Q. 7. How is this product dispensed so far as your experience as a druggist is concerned?

A. We dispense it on physicians' prescriptions and sell it on calls of the laity, in quantities as prescribed or called for.

Q. 8. How do physicians so far as your experience goes write prescriptions for this product?

A. "Coco-Quinine," just as "Coco-Quinine."

Q. 9. How do customers ask for it over the counter?

A. "Coco-Quinine," "chocolate quinine." About fifty per cent I believe call it "chocolate quinine."

Q. 10. Whose product do you understand is intended when a customer asks for "chocolate quinine."

By Mr. Rawle: Objected to as res inter alias acta.

A. Lilly's.

Q. 11. Why do you think that they intend Lilly's?

A. That is the preparation we handle and has been giving satisfaction and this is what they have been accustomed to getting.

Q. 12. Did you ever receive prescriptions written for "Quin-Coco"?

A. No, sir.

435 Q. 13. Did you ever have a customer ask for Quin-Coco?

A. No.

Q. 14. Has Quin-Coco been offered to you for sale and if so by whom?

A. Yes, by Mr. McCarty, I don't know his given name or initials, representative of William R. Warner & Co.

Q. 15. Please state as near as you can recollect what Mr. McCarty said to you when he offered to sell you Quin-Coco?

A. Well, he was in my prescription room looking over my wants and asked me if I needed some "Coco-Quinine," and I don't know just what reply I made to that, but the question came up that his people did not make Coco-Quinine and he told me his was a similar and just as good a preparation.

Q. 16. What else did he say about it, if anything?

A. He said his sales on that preparation were larger than Coco-

Quinine. He told me the other people were using it, that there was a saving in the price, but I don't remember the exact amount.

Q. 17. What did he tell you that other people were using it for and what did he tell you that you could use it for?

By Mr. Rawle: Objected to as leading.

A. For Coco-Quinine.

Q. 18. What do you mean by that it could be used "for Coco-Quinine?"

By Mr. Rawle: Objected to as leading and because the only proper question is as to what was said by the salesman.

A. I gave my testimony that it was used on physicians' prescriptions and dispensed on calls. That is the only way I could use it. There is no other purpose for it.

Q. 19. Do you mean that there was no other purpose for
436 Quin-Coco except to fill prescriptions and calls for Coco-Quinine? If not what do you mean?

By Mr. Rawle: Same objection.

A. I do.

Q. 20. Did you buy any of the Quin-Coco from Mr. McCarty?

A. No, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 21. How often has McCarty called on you to solicit trade for Warner goods?

A. Every three or four or six months, I am not sure about it, for the last two or three years.

X Q. 22. Have you ever bought any of his line?

A. Yes.

X Q. 23. When did that conversation take place?

A. To the best of my recollection sometime within a year and eighteen months ago.

X Q. 24. Did he tell you then Quin-Coco was competing with Coco-Quinine?

A. He did.

X Q. 25. And in substance that he was trying to sell his product in place of Coco-Quinine?

A. That is what I understood from the conversation.

X Q. 26. It isn't considered honest in a druggist to pass off one preparation for another without telling the doctor or the customer, is it?

A. There is a great difference of opinion on that subject. I mean that when a U. S. P. article is prescribed that any pharmaceutical house make, some druggists hold that they have a right to dispense any reputable manufacturing house's goods.

437 X Q. 27. But that doesn't apply to specialities, does it?

A. No.

X Q. 28. And in specialties you include Quin-Coco, do you?

A. Specialties, yes.

X Q. 29. And Quin-Coco could be sold by a druggist with entire honesty in case he should get the consent of the doctor on the prescription or explain the matter to the customer over the counter. Is that correct?

A. I think so.

X Q. 30. And that is the only way you as an honest druggist, would do it. Is that correct?

A. I haven't handled any Quin-Coco and haven't had any trial on that.

X Q. 31. Of course it could be honestly sold on a doctor's prescription or to a customer when "chocolate quinine" is called for, couldn't it?

A. If I believe it to be the same thing.

X Q. 32. I don't understand you to say that Mr. McCarty that day, made any suggestion to you that you should buy his Quin-Coco and dishonestly pass it off on the doctors or the customers?

A. I don't know whether he considered it dishonest.

X Q. 33. (Question repeated.)

A. He suggested that I buy Quin-Coco.

X Q. 34. But he didn't suggest to you that you should sell it in a way that you have said was dishonest?

A. He suggested that there was a saving in price to me, that I could save so much per gallon.

X Q. 35. But did he tell you that you could sell it dishonestly and make money?

A. Well, honor wasn't mentioned.

X Q. 36. What did he say on this subject. I will ask you to repeat the entire conversation, using the form "He said" and "I said."

438 A. A conversation having taken place as long ago as that would be right hard to repeat verbatim.

X Q. 37. Repeat it as nearly as you can?

A. Well, Mr. McCarty solicited me to buy Quin-Coco or their preparation of chocolate quinine; I don't know as he used the word "Quin-Coco." He told me that there was a saving in price and that other druggists were buying it.

X Q. 38. What else did he say?

A. In regard to Quin-Coco. He said it was as good a preparation as Coco-Quinine. I don't remember all that was said. We talked about business in general. I couldn't tell everything that Mr. McCarthy said to me or that I said to him.

X Q. 39. I have been asking you to search your memory and state the entire conversation on the subject of Quin-Coco. Is there anything else that you can remember on that subject?

A. I think that I have given during my examination practically all that is connected with the subject.

X Q. 40. I read you Q. 19 and your answer. I take it that you

hardly mean that there is no way to sell Quin-Coco except to fill prescriptions and calls for Coco-Quinine, dishonestly.

A. No, I don't say that.

X Q. 41. And you don't mean to say, do you, that Mr. McCarty suggested to you that you should dispense Quin-Coco dishonestly and sell it to customers dishonestly?

A. He didn't suggest to me to do anything he called dishonest.

X Q. 42. How many drug stores are there in Geneva and its territory?

A. Two in Geneva at present.

X Q. 43. What population?

A. About fifteen hundred.

X Q. 44. How far is it from Montgomery?

A. A hundred and thirty-eight miles by rail, nearly South of Montgomery.

439 X Q. 45. You said you had calls for chocolate quinine and supplied Coco-Quinine. And I understood you to say that the customer didn't always know very much about what they were asking for, but as you keep only Coco-Quinine, you sell them Coco-Quinine. Is that correct?

A. I didn't say the customers didn't know much about what they were calling for.

X Q. 46. When customers call for chocolate quinine, being of all ages and conditions of life, do you mean that each one of them understands clearly that what he wants is Coco-Quinine?

A. Yes, when they call on me for it.

X Q. 47. That is because that is the only such preparation that you have ever sold them?

A. With one exception. I bought one gallon some time in the past and did not use it all up. It was a preparation of chocolate and quinine.

X Q. 48. Whose make was it?

A. I do not remember.

X Q. 49. Was it William R. Warner & Co., of Philadelphia, or Searle & Hereth Company?

A. I can't say.

X Q. 50. What is your best recollections on that subject?

A. Either William R. Warner's or Henry K. Wampole's.

X Q. 51. How long ago was that?

A. To the best of my recollection six or seven years ago.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 52. Why did you not use the gallon of the preparation you say you bought six or seven years ago?

By Mr. Rawle: Objected to as immaterial.

440 A. Because it deteriorated before I could use it.

R. D. Q. 53. What character of relations exist between yourself and Mr. McCarty?

A. Very friendly.

R. D. Q. 54. Would you care to make any statement on the record that would reflect on Mr. McCarty's character or integrity?

A. No, sir.

Deposition closed.

JOHN M. MOSELEY.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

By Mr. Rawle: I object to R. D. Q. 54 and the answer thereto, which question was asked and answered during my absence from the room, the ground of objection being that the question is incompetent and inadmissible and is inconsistent with the oath taken by the witness.

By Mr. Bradford: As to R. D. Q. 54 being propounded in the absence of defendant's counsel, the facts are that plaintiff's counsel advised defendant's counsel at the conclusion of his cross-examination that he wished to ask the witness another question or two and that R. D. Q. 53 was propounded before defendant's counsel left the room, and that plaintiff's counsel is in no wise responsible for defendant's counsel absenting himself at that time.

NOTE.—After the conclusion of the examination, on reading the deposition, the witness (Moseley) corrects his answers to X Q. 39 by inserting before "practically" the words "during my
441 examination;" and his answer to X Q. 41, by inserting before "dishonest" the words "he called," stating that these corrections were necessary to make the meaning of these answers clear. These corrections were made after Mr. Rawle, counsel for defendant, had left the room, for recess. The witness had previously called Mr. Bradford's attention to these answers and to his desire to correct these two answers and he was told by Mr. Bradford to write in pencil what he wanted as corrections and to explain to the Special Examiner who would attend to having the corrections inserted in the typewritten copy. This was done accordingly. Mr. Bradford also states that in formulating the corrections, especially the correction to the answer to X Q. 41, he suggested the two words used by the witness to take the place of a longer and more elaborate explanation to the same purport suggested by the witness. This was done purely to simplify the correction and to express what the witness stated he meant, in the simplest form possible.

By Mr. Rawle: Under the circumstances stated, I take exception to the correction in the answer to X Q. 39, because it makes the answer irresponsive to my question. And the same objection to the correction to the answer to X Q. 41. And inasmuch as the correc-

tions were made by the witness in the absence of defendant's counsel, during recess, and after a discussion between the witness and the plaintiff's counsel, I object to the corrections as forming a part of the deposition.

By Mr. Bradford: The witness Moseley was asked by the Special Examiner to read his deposition and if correct to sign it. The corrections were made as above stated and neither plaintiff's counsel nor the witness are to blame that defendant's counsel did not
442 remain until the witness's signature was affixed to the deposition.

CHARLES E. RIORDON,
Special Examiner.

Recess.

After Recess.

WILLIAM A. CUNNINGHAM, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William A. Cunningham; age 35; Montgomery, Ala.; Retail Druggist, I am a partner in the Persons Drug Company.

Q. 2. How long have you been in the retail drug business, and where?

A. For the past three years I have been a partner in the Persons Drug Company of this city. Prior to that time I was with the Exchange Drug Company for about a year and a half. Prior to that time I was with the Jacobs Pharmacy here, for about the same length of time. Prior to that I was with W. D. Taylor at Bessemer, for about six months. Before then I was with Wilkinson Drug Company, at Marion, Alabama. I have been in the drug business in all about fifteen years.

Q. 3. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, whose product do you recognize it to be?

A. Yes, sir; I am familiar with it. It is the product of Eli Lilly & Co.

443 Q. 4. Did you know of any similar syrup chocolated quinine prior to the introduction of Coco-Quinine by Eli Lilly & Co.?

A. No, sir.

Q. 5. Do you handle Coco-Quinine at your present store?

A. Yes, sir.

Q. 6. How do you dispense it?

A. Mostly on physicians' prescriptions and sometimes on calls by customers, in quantities as called for.

Q. 7. How do physicians usually write their prescriptions for this product?

A. As a usual thing just "Coco-Quinine." Sometimes like all preparations of that kind they specify "Lilly's," but as a usual thing just "Coco-Quinine."

Q. 8. Have you ever seen a prescription written for Quin-Coco?
A. No, sir.
Q. 9. Have you ever had a customer ask for Quin-Coco?

By Mr. Rawle: The last two questions are objected to as irrelevant.

A. No, sir.
Q. 10. Did you handle Coco-Quinine before being connected with your present store I mean at the other places where you have stated you were employed or in business?
A. Yes, sir.
Q. 11. Do you handle Quin-Coco at your store, and if so, how long have you handled it?
A. Well, since I have been there, it was being handled when I went there. We still handle it.
Q. 12. How do you dispense Quin-Coco?
A. Well, we usually label it "chocolate quinine." That is the way it is usually called for.
Q. 13. What percentage of customers ask for "chocolate quinine" and what percentage for "Coco-Quinine?"
444 A. Nearly all of them ask for "chocolate quinine."
Q. 14. How long have you been selling this as chocolate quinine?
A. Ever since I have seen it I have dispensed it as "chocolate quinine."
Q. 15. Is Quin-Coco ever given to customers in your store when they ask for Coco-Quinine?

By Mr. Rawle: Objected to as incompetent, as calling for matter which is res inter alias acta and cannot bind the defendant.

A. No, sir.
Q. 16. But you do supply it when they ask for "chocolate quinine?"
A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 17. I understand you to mean in your answer to Q. 9, that you never had a customer ask for Quin-Coco by that precise trade name. Is that correct?
A. That is correct, yes, sir.

Cross-examination closed.

Deposition closed.

WILLIAM A. CUNNINGHAM.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

J. JOHNSTON MOORE, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

445 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. J. Johnston Moore; age, 35; Montgomery, Ala.; Retail Druggist, Proprietor of Moore's Drug Store. I have been in business on my own hook for five years, and prior to that time I was a clerk with two of the leading stores in the city, Persons Drug Company and G. A. Knabe & Brother.

Q. 2. Does your store do a large prescription business?

A. Yes, sir. Our prescription business is about as large as any in the city.

Q. 3. Do you handle Coco-Quinine at your store?

A. Yes, sir.

Q. 4. Whose product do you recognize it to be?

A. Eli Lilly & Company.

Q. 5. How do you dispense it?

A. We dispense it on prescriptions and on calls.

Q. 6. How do physicians designate the product on their prescriptions?

A. Usually "Coco-Quinine," occasionally adding the name of the manufacture-.

Q. 7. How do customers usually ask for it over the counter?

A. They ask for "Coco-Quinine."

Q. 8. Does your store receive prescriptions from the physicians generally all over the city?

A. Yes, sir.

Q. 9. What proportion of the physicians of Montgomery prescribe Coco-Quinine so far as you experience goes?

A. I should say all of them prescribe it occasionally. I don't know any of them that don't.

Q. 10. Have you ever received a prescription written for "Quin-Coco?"

A. No, sir.

446 Q. 11. Have you ever had a customer ask for Quin-Coco over the counter?

A. No, sir.

Q. 12. As I understand it you do not handle the product called Quin-Coco?

A. I do not.

Q. 13. Do your customers ever ask for "chocolate quinine?"

A. Yes, sir, occasionally.

Q. 14. What product do you understand they mean when they ask for chocolate quinine?

A. Coco-Quinine, sir.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 15. What proportion call for chocolate quinine, or use some such name as sweet quinine, or tasteless quinine, or syrup of quinine?

A. Three to five per cent., very few.

Cross-examination closed.

Deposition closed.

J. JOHNSTON MOORE.

Subscribed and sworn to before me this 13th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Marshallville, Ga., tomorrow, Wednesday, April 14th, 1915, a- 9 a. m.

Marshallville, Ga., April 14, 1915—9 a. m.

Met pursuant to adjournment.
Parties present as before.

447 WILLIAM A. JOLLY, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William A. Jolly; age 23; Marshallville, Ga.; Retail Druggist, Proprietor of Jolly's Pharmacy.

Q. 3. How long have you been in the retail drug business?

A. Twenty-one months for myself. Prior to that time I worked three years for M. J. O. Booton, of this town.

Q. 3. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if you are, whose product do you recognize it to be?

A. I am familiar with it and it is the product of Eli Lilly & Co.

Q. 4. How long have you handled it both in your own store and the other store, if you handled it there?

A. Four years and nine months.

Q. 5. How do you dispense it?

A. From "ten cents worth" on up, to customers as they call for it, and also on prescriptions.

Q. 6. How do physicians designate the product on their prescriptions?

A. "Coco-Quinine."

Q. 7. Whose product do you recognize as specified when a prescription comes in written for "Coco-Quinine?"

A. Eli Lilly & Company's.

Q. 8. How do people ask for this product over the counter?

A. "Coco-Quinine," "Chocolate Quinine," "Quinine Syrup."

Q. 9. Whose product do you understand the customer in-
448 tends when either of these names is used?

By Mr. Rawle: Objected to as immaterial and res inter alias acta.

A. Why, Eli Lily's Coco-Quinine.

Q. 10. About what proportion of your customers ask for the product by the name "Coco-Quinine" and what proportion by the other names such as "chocolate quinine?"

A. About half, fifty per cent.

Q. 11. Did you ever have a customer call for a product called "Quin-Coco?"

By Mr. Rawle: Objected to as irrelevant.

A. No, sir.

Q. 12. Did you ever have a physician's prescription for Quin-Coco?

(Same objection.)

A. No, sir.

Q. 13. Have you been handling Coco-Quinine continuously in your store since you started in business?

A. I have.

Q. 14. Is Coco-Quinine used quite generally in this locality?

A. It is.

Q. 15. Both by physicians and the laity?

A. Yes.

Q. 16. Do you know anything about the preparation called "Quin-Coco," and if so, what?

A. The only thing I know. I don't believe I could tell you the formula for it. It was represented to me as a chocolate quinine, the same as Coco-Quinine.

By Mr. Rawle: The answer is objected to as hearsay and not connected with the defendant.

449 Q. 17. Who represented Quin-Coco to you to be the same as Coco-Quinine?

(Objected to as leading and for the same reasons.)

A. Warner's salesman, Nottingham. I think that is his name.

Q. 18. You mean William R. Warner & Company's salesman?

A. Yes, William R. Warner & Company.

Q. 19. What did this William R. Warner and Company's salesman say to you on this subject?

A. His question to me was "How is your stock of Coco-Quinine." My stock of Coco-Quinine was low, and then he brought out a sample. I believe, of Quin-Coco. He says that this product, this Quin-Coco

is the same as Coco-Quinine, and it comes much cheaper. I think that is about all there was to it. There may have been some few other words like that.

Q. 20. Did he say anything about whether or not you could use it to supply the demand for Coco-Quinine?

By Mr. Rawle: Objected to as leading because the only proper question is as to what was said.

A. He did.

Q. 21. What did he say as near as you can remember?

A. All he said was that it is the same as Coco-Quinine and you can supply your trade accordingly.

Q. 22. Did you buy the Quin-Coco on these representations?

A. I did, one gallon.

Q. 23. And have you used it in the way it was represented to you that you could use it?

A. I have not.

Q. 24. How have you used it?

450 A. I have given it to customers calling for "chocolate quinine," "quinine syrup," etc.

Q. 25. I believe, however, you have stated, that your customers were accustomed to asking for "Coco-Quinine, Lilly," by these names, prior to your purchase of the Quin-Coco. Is this correct?

By Mr. Rawle: Objected to because the witness has not so stated.

A. They called for "Coco-Quinine," "chocolate quinine," "quinine syrup," before I bought this Quin-Coco.

Q. 26. And they had been furnished the Lilly product all of the time in response to such calls before you put the Quin-Coco in stock?

By Mr. Rawle: Objected to as leading and as immaterial and irrelevant.

A. Yes.

Direct examination closed at 9:20 a. m.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 26. When did Nottingham call on you?

A. Inside of six months ago.

X Q 27. How often has he called on you?

A. Three or four times a year.

X Q. 28. Have you bought Quin-Coco from him more than once?

A. No.

X Q. 29. Was the interview you have referred to the first time he ever talked Quin-Coco to you?

A. The first time.

X Q. 30. Now will you please repeat again the entire conversation that took place at that interview on the subject of Quin-Coco, giving

it near as you can, in narrative form, and the words used by him and by you?

451 A. He said "How are you fixed on Coco-Quinine." I looked over my stock and found I was low. He offered me a product by the name of Quin-Coco, at a very much better price than Coco-Quinine, claiming that it was the same as Coco-Quinine. He said that "you can use it for Coco-Quinine." I compared the prices of Coco-Quinine and Quin-Coco, finding that Quin-Coco was cheaper. I told him to give me one gallon.

X Q. 31. In showing you his Quin-Coco did he mention the formula or tell you what it had in it?

A. No, I don't think he did.

X Q. 32. He surely must have mentioned the amount of quinine contained in it?

A. I don't remember.

X Q. 33. Wouldn't you naturally ask him about that?

A. I think I would.

X Q. 34. Why would you buy it without knowing something about what the preparation contained?

A. Thinking it was the same as Coco-Quinine.

X Q. 35. The same in what respect?

A. Proportion of quinine and syrup.

X Q. 36. Have you now in answer to my questions stated the entire conversation as to Quin-Coco?

A. Yes, I have.

X Q. 37. I am asking whether in answer to my questions alone and without regard to Mr. Bradford's questions you have now stated the entire conversation?

A. I have stated the entire conversation to the best of my knowledge.

X Q. 38. Do you want to add anything to what you have said in order that you may be sure that you have stated the entire conversation in answer to my questions?

A. I know I have stated it to the best of my knowledge.

X Q. 39. Upon what kind of calls by customers have you

452 sold Quin-Coco? Are they any other than "chocolate quinine" and "quinine syrup"?

A. "Chocolate quinine," "quinine syrup," or "quinine mixed with syrup."

X Q. 40. You stated in answer to Q. 23 that you had not used Quin-Coco in the way it was represented to you that you could use it? Please state what was said by the Warner salesman which you had in your mind in answering that question?

A. I filled my customers' orders as nearly correct as possible. I use Quin-Coco when I have a call for "chocolate quinine," or "quinine with syrup."

X Q. 41. Did Nottingham tell you that you could sell it on such calls?

A. I don't remember. I think he did.

X Q. 42. Is it considered square business in a druggist to use one

drug or preparation in filing a prescription or in a sale over the counter when a different drug or preparation is called for?

A. No.

X Q. 43. It is not considered either honest or ethical in a druggist, is it?

A. No.

X Q. 44. And that is the view that you take of the subject, is it?

A. Yes.

X Q. 45. You have known Nottingham pretty well as a salesman?

A. Yes.

X Q. 46. And regard him as a square man?

A. To the best of my knowledge.

X Q. 47. Did Nottingham make you any proposition that day which you considered dishonest?

A. Yes.

X Q. 48. Please give the words he used in that connection? I thought that you had told me that you had already stated the entire conversation in your answers to my questions?

453 By Mr. Bradford: Objected to as calling for unnecessary repetition, even in cross-examination.

A. When he told me that you could use Quin-Coco for Coco-Quinine.

X Q. 49. Please give his exact words?

(Objection repeated.)

A. I don't remember his exact words.

X Q. 50. Did he say anything more than that you could carry it in stock in place of carrying Coco-Quinine?

(Objection repeated.)

A. I have answered this in previous questions. He said "You may use it in place of Coco-Quinine."

X Q. 51. Did he mean anything more than that you could use it on calls for "chocolate quinine" or "quinine syrup?"

A. Yes.

X Q. 52. What more did he mean?

A. As a substitute for Coco-Quinine.

X Q. 53. What do you mean by the word "substitute" as you use it?

A. Having a call or a prescription for Coco-Quinine that I could use Quin-Coco.

X Q. 54. Did he suggest to you that you could dishonestly use it in this way?

A. Yes.

X Q. 55. Please give the words in which he suggested that?

By Mr. Bradford: Objected to as unnecessary repetition, the witness having several times stated the facts; and as an improper question, being for the plain purpose of attempting to pervert the facts by some confusion thereof.

By Mr. Rawle: The objection is objected to as entirely improper.

454 A. He said that Quin-Coco was the same as Coco-Quinine and could be sold as Coco-Quinine.

X Q. 56. Did he use the word "substitute?"

A. I don't remember.

X Q. 57. Did he tell you that Quin-Coco could be sold as Coco-Quinine without informing the doctor or the customer calling for Coco-Quinine?

A. He did.

X Q. 58. What words did he use in telling you that?

By Mr. Bradford: Objected to as unnecessary repetition.

A. I don't remember.

X Q. 59. Don't you see that you are charging Nottingham as a salesman with making a dishonest suggestion to you?

A. I don't look at it in that light.

X Q. 60. Do you mean that he didn't make a dishonest suggestion to you?

By Mr. Bradford: Objected to as the witness has already answered the same question several times.

A. After his representation it was left entirely up to me.

X Q. 61. Do you mean that it was left up to you to dispense Quin-Coco honestly or dishonestly, as you should see fit?

A. Yes.

X Q. 62. Haven't you testified that you consider "substitution" as a dishonest practice in a druggist?

A. I have.

X Q. 63. I assume that you wish to consider yourself as carrying on your business honestly and ethically in that respect. Am I correct?

A. You are.

X Q. 64. If, then, Nottingham made you any dishonest suggestion as to selling Quin-Coco, did you express to him any re-

455 sentment for impugning your honesty in your business?

By Mr. Bradford: Objected to as improper, immaterial and irrelevant.

A. He did not approach me in that light.

X Q. 65. Do you mean that he didn't approach you in a dishonest light?

By Mr. Bradford: Objected to as this is a question for the court and not for the witness to decide: the only thing the witness can state is as to the facts.

A. You may construe his conversation that I could sell Quin-Coco for Coco-Quinine honestly without being dishonest.

X Q. 66. Is that the way you construed it?

A. It is when I bought it.

X Q. 67. Is it possible that he meant no more than that you could sell Quin-Coco on calls for "chocolate quinine" or "syrup of quinine," and do it honestly, realizing that you had been previously supplying such demands with Coco-Quinine?

A. No.

X Q. 68. Previously to buying Quin-Coco I understand you had been supplying calls for "chocolate quinine" or "syrup of quinine" with Coco-Quinine exclusively. Is that correct?

A. Yes.

X Q. 69. Wasn't Nottingham's suggestion that you could supply that demand, viz., for "chocolate quinine" or "syrup of quinine," with Quin-Coco?

By Mr. Bradford: Objected to as unnecessary repetition, the witness having already answered this same question.

A. Yes, and all my Coco-Quinine trade.

X Q. 70. Did you yourself consider it honest to use Quin-Coco on calls for Coco-Quinine?

456 A. No.

X Q. 71. Then you considered that the suggestion which you say Nottingham made you was a dishonest suggestion from your point of view?

A. When Mr. Nottingham stated that "you could sell Quin-Coco for Coco-Quinine to customers calling for Coco-Quinine" it was a dishonest suggestion.

X Q. 72. But you testified in answer to X Q. 65 and X Q. 66 that that wasn't the way you construed it "when I bought it." Can you explain?

A. I bought the Quin-Coco to sell for Coco-Quinine upon calls for "quinine with syrup" and "chocolate quinine," and not to sell it for "Coco-Quinine," and not to use it as a substitute for Coco-Quinine upon a prescription calling for "Coco-Quinine." Therefore I do not use it entirely as a substitute.

X Q. 73. I read you:

"X Q. 65. Do you mean that he didn't approach you in a dishonest light?

"A. You may construe his conversation that I could sell Quin-Coco for Coco-Quinine honestly without being dishonest.

"X Q. 66. Is that the way you construed it?

"A. It is when I bought it."

"X Q. 71. Then you considered that the suggestion which you say Nottingham made you was a dishonest suggestion from your point of view?

"A. When Mr. Nottingham stated that "you could sell Quin-Coco for Coco-Quinine to customers calling for Coco-Quinine," it was a dishonest suggestion."

Can you explain the difference between these answers?

A. When I bought Quin-Coco I did not buy it with the intention to substitute it for Coco-Quinine. I looked at it in the light that

I could use Quin-Coco for "chocolate and quinine" or could
457 use it as "quinine mixed with syrup."

X Q. 74. What I want to know is how you can explain your having testified in one place that Nottingham's suggestion could be construed as honest and in another place that it was dishonest? I am referring to X Q. 65, 66 and 71, which I have just quoted in the last question.

A. At the time I bought Quin-Coco my intention was to use Quin-Coco when I had a call for chocolate mixed with quinine, and chocolate quinine. When Mr. Nottingham suggested that I could use Quin-Coco for Coco-Quinine it was a dishonest suggestion, but when he suggested that I could use Quin-Coco for chocolate quinine and quinine mixed with syrup, I construed this could be done honestly.

X Q. 75. But you said above in answer to X Q. 65 and X Q. 66, that his entire conversation on this point could be construed as honest. How do you reconcile that statement with the one you have just made?

By Mr. Bradford: Objected to as not justified by the witness's answer in that he did not use the words "entire conversation;" also as useless repetition and calling for no facts that can be of any possible assistance to the court in deciding the issues herein.

A. I do say that it was dishonest for Mr. Nottingham to represent Quin-Coco to be the same as Coco-Quinine. But I sell Quin-Coco for "quinine mixed with chocolate," etc.

X Q. 76. Is that all that he represented about Quin-Coco, that it was the same as Coco-Quinine?

A. And it could be sold for Coco-Quinine, showing me a larger profit than Coco-Quinine could.

X Q. 77. X Q. 73 repeated.

By Mr. Bradford: I protest against this useless repetition,
458 useless padding of the record, and useless waste of time and money when the witness has answered, as counsel must know, fully and frankly as to every fact within his knowledge that can be of any use to the court. Such questions are purely a technical effort to confuse the record, and are improper and entirely out of place in a suit of this kind.

By Mr. Rawle: Mr. Rawle objects to the objection as an improper interference with cross-examination.

By Mr. Bradford: Mr. Bradford replies that he regrets exceedingly that he has to call the court's attention to such a gross violation of the privilege of cross-examination in an equity cause, outside of the court room, as is being perpetrated in this case.

A. My answer is the same.

X Q. 78. Why have you testified at one time that Nottingham's conversation was not dishonest and at another time that it was dishonest in its suggestion?

By Mr. Bradford: Objected to as not a correct statement of what the witness has testified to; also as immaterial and irrelevant.

A. My answer to X Q. 65 and X Q. 71 will explain.

X Q. 79. You have testified that you construed Nottingham's conversation to the effect that you could sell Quin-Coco for Coco-Quinine honestly without being dishonest. You have also testified that Nottingham's statement to you that you could sell Quin-Coco for Coco-Quinine was a dishonest suggestion. How do you reconcile these two statements?

By Mr. Bradford: Objected to because it is not a correct statement of what the witness has testified.

459 A. I have not testified to this effect, referring you to answer to X Q. 65.

X Q. 80. I again call your attention to X Q. 65, X Q. 66 and X Q. 71, and ask you how you reconcile the difference between the statements therein made?

A. When Mr. Nottingham said that Quin-Coco was the same as Coco-Quinine or could be sold for Coco-Quinine, it was a dishonest representation. But when Mr. Nottingham represented it that way and that it could be sold as chocolate quinine or quinine in syrup, this was an honest representation, to my best knowledge.

X Q. 81. But again I point out to you that you have said that you did not construe Nottingham's conversation in a dishonest light? Apparently you meant his entire conversation. Now you say that you construed part of it in a dishonest light. How do you reconcile these two statements?

By Mr. Bradford: Objected to as not a correct statement of the witness's testimony; and further that the witness has in several answers explained how he reconciles the two statements, and clearly what he means.

A. When Mr. Nottingham represented Quin-Coco to be the same as Coco-Quinine, it was dishonest. But when he made it plain enough for me to see that I could sell it for chocolate quinine, or quinine with syrup, I looked at it in an honest way.

X Q. 82. That is your answer, is it?

A. Yes.

— Q. 83. And that was his suggestion that you say was dishonest?

By Mr. Bradford: Objected to as a clear attempt to trap the witness, a practice wholly out of place in an equity court, and as improper.

460 By Mr. Rawle: Mr. Rawle objects to the objection as an exceedingly improper interference with his cross-examination.

By Mr. Bradford: Mr. Bradford replies that the objection is believed to be fully justified by his duty to the court.

A. And that Quin-Coco is the same as Coco-Quinine and could be sold or substituted for Coco-Quinine that was the dishonest suggestion or representation.

X Q. 84. But you have said before that you did not remember whether Nottingham used the word "substitute." Is that correct?

A. To the best of my knowledge it was represented to me to be used as a substitute. The word "substitute" may have been used, but at the same time it was made plain enough to me that you could use Quin-Coco as a substitute for Coco-Quinine.

X Q. 85. Do you swear that the word "substitute" was used by Nottingham?

A. I cannot, but I will refer you to my answer to X Q. 84.

X Q. 86. In answer to X Q. 84 you swear that Nottingham said that Quin-Coco could be substituted for Coco-Quinine. You have just said that you cannot so swear. Which is correct?

By Mr. Bradford: Objected to as a clear misstatement of the witness' testimony.

A. I cannot swear postively that the word "substitute" was used, but refer you to my answer to X Q. 84.

X Q. 87. If you say that you considered Nottingham a square man why do you place a dishonest construction on what he said to you, or assume that he was asking you to do a dishonest thing?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. When he represented Quin-Coco to be the same as Coco-Quinine; but in every other respect I do say Mr. Nottingham did
461 everything on the square, to the best of my knowledge.

X Q. 88. Was Nottingham's statement to you that Quin-Coco was the same as Coco-Quinine, the one which you considered dishonest, as you have just said in your last answer?

By Mr. Bradford: The question is objected to as the witness has answered the identical question before and the same question in substance many times, and for these reasons as being entirely improper and out of place.

A. Yes, and that it could be sold for Coco-Quinine.

X Q. 89. What is the population of this settlement?

A. Between eleven and twelve hundred.

X Q. 90. Any more drug stores here?

A. One.

X Q. 91. How many doctors?

A. Three.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 92. What surrounding territory does your store serve?

A. Four miles North of Marshallville; five miles West of Marshallville; ten miles South of Marshallville, and six miles East of Marshallville.

R. D. Q. 93. What is the population approximately of this territory?

A. I don't believe I could come within two or three thousand of it; it is pretty thickly settled. I would guess from eight to ten thousand people, easily.

R. D. Q. 94. About what is the annual volume of your business?

A. Between ten and eleven thousand dollars.

Re-direct-examination closed.

462 Recross-examination.

By Mr. Rawle:

R. X Q. 95. Does the broader territory you have specified include any other town, village or hamlet?

A. Winchester, Georgia, which has one general store, but no drug store, and a population of about twenty or twenty-five persons. That is the only settlement in the territory which I have named.

R. X Q. 96. Do you mean to say that in the territory you have indicated there are from seven to eight thousand more inhabitants outside of Marshallville, it being, as I understand you, a purely farming country?

A. It is not only farming, it is peach growing and everything else, asparagus, cotton, grain, potatoes, oranges, bananas, etc. The answer that I gave for the population of the surrounding country was a guess one.

Deposition closed at 1 o'clock p. m.

WILLIAM A. JOLLY.

Subscribed and sworn to before me this 14th day of April 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet this evening (April 14, 1915) at 8 o'clock at Hotel Dempsey, Macon, Georgia.

Macon, Georgia,
Hotel Dempsey, April 14, 1915—8 p. m.

Met pursuant to adjournment.
Parties present as before.

463 R. H. GREENE, a witness, called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by Counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. R. H. Greene; age, 27; Macon, Ga.; Retail Druggist. I am prescription clerk in the employ of the Taylor-Bayne Drug Company, Midland Branch. They have six retail stores in this city, and I am transferred from one to another, but chiefly employed at the Midland Branch. I have been employed by this concern for

over two years and prior to that time was with C. F. Barrett, druggist at Millersville, Ga., for nearly four years. I have been filling prescriptions in all for about six years.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?

A. I am. It is the product of Eli Lilly & Company.

Q. 3. How long have you been familiar with this product?

A. Ever since I have been in the drug business.

Q. 4. How is it dispensed in the stores where you have been employed?

A. On prescriptions and calls.

Q. 5. How do physicians designate this product on their prescriptions as a rule, so far as your experience goes?

A. Sometimes they put "Lilly's" behind it and sometimes it is written "Coco-Quinine."

Q. 6. When a prescription is written just "Coco-Quinine," without the word "Lilly," what product do you understand is intended by the physician?

A. Lilly's Coco-Quinine.

464 Q. 7. Do the stores where you have been employed do a large prescription business?

A. Yes, sir.

Q. 8. Receive prescriptions from physicians generally all over the city?

A. Yes, sir.

Q. 9. Have you personally ever seen a prescription written for "Quin-Coco?"

A. I don't remember that I have.

Q. 10. Have you ever heard a customer ask for "Quin-Coco?"

A. I don't remember that I have.

Direct-examination closed.

No Cross-examination.

R. H. GREENE.

Subscribed and sworn to before me this 14th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

JOHN H. VINSON, a witness, called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age residence and occupation?

A. John H. Vinson; age, 33; Macon, Georgia; Traveling Salesman for Eli Lilly & Company, covering Central Georgia, with headquarters at Macon, Ga.

Q. 2. Among other preparations which you handle or for which you solicit orders do you include the item of Coco-Quinine?

A. Yes.

465 Q. 3. Please state what you can relative to the conditions of the trade in this item in your territory?

A. I find that the sale of Coco-Quinine has materially decreased on account of the sale of the item Quin-Coco sold by William R. Warner & Co. On soliciting orders for Coco-Quinine I have quite a number of customers who decline to give me orders for Coco-Quinine stating that they can buy Quin-Coco at a very much less price. I should judge the sale of Quin-Coco is at least fifty per cent. of that of Coco-Quinine, naturally reducing the sale of Coco-Quinine very materially.

By Mr. Rawle: The last two sentences of the answer are objected to as hearsay, as res inter alias acta, and as incompetent. The question is objected to as incompetent.

Q. 4. In what proportion of the drug stores in your territory have you personally seen packages or bottles of the William R. Warner & Company preparation called Quin-Coco?

A. I should say at least forty per cent.

Q. 5. Have you ever discussed with druggists the question of demand for Quin-Coco, and if you have, do you know of any druggist who claims to have ever had any demand for Quin-Coco as such?

By Mr. Rawle: Objected to as incompetent, as calling for transactions between third parties, not parties to the record, and for hearsay, and for other reasons too numerous to mention.

By Mr. Bradford: And which perhaps may as well be left unmentioned by defendant.

A. I have discussed it and know of no one who has any demand for Quin-Coco, or has ever claimed to have had any.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 6. How many drug stores are there in your territory?

466 A. I should say at least a hundred and fifty. In Macon and suburbs there are about twenty-eight.

X Q. 7. How often do you average your calls on each of these in your territory?

A. Every six weeks.

X Q. 8. You have spoken of the reduction of the sale of Coco-Quinine. Is it possible that this may have in some part been the result of the decrease in malarial diseases?

A. I don't think so.

X Q. 9. Have you any knowledge or information in your business as to whether there has been, in the last five years, a decrease in malarial diseases in your territory?

A. I couldn't say that there had been a decrease. The conditions seem about normal, the malarial conditions.

Cross-examination closed.

Deposition closed.

JOHN H. VINSON.

Subscribed and sworn to before me this 14th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Thursday, April 15, 1915, at 8.30 a. m., at same place.

Macon, Georgia, April 15, 1915—8.30 a. m.

Met pursuant to adjournment.
Parties present as before.

STEPHEN D. COLEMAN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

467 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Stephen D. Coleman; age 27; Fort Gaines, Georgia; retail druggist; proprietor of the People's Drug Store at Fort Gaines, Ga.
Q. 2. How large a place is Fort Gaines, Ga.?
A. Between twelve and fifteen hundred.
Q. 3. How many drug stores?
A. Three.
Q. 4. What territory does your store serve around Fort Gaines?
A. In General all over Fort Gaines and within the territory fifteen miles surrounding Fort Gaines.
Q. 5. What is the population of this territory approximately?
A. I couldn't give any accurate guess, but I should estimate about as many more as in Fort Gaines.
Q. 6. Do you do a considerable prescription business?
A. Yes, sir; I do a right nice business.
Q. 7. About how many physicians have prescriptions filled at your store?
A. Three, but one of them not all of his business. He sends some of his prescriptions to another drug store.
Q. 8. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if you do, whose preparation is it?
A. I do. It is Lilly's.
Q. 9. How do you dispense Coco-Quinine?
A. On prescriptions generally and sometimes on call.
Q. 10. Do all of the physicians who have prescriptions filled at your store use this preparation in their practice?

A. One of them mostly. I have had prescriptions from all of them.

468 Q. 11. How do they designate the preparation?

A. Just "Coco-Quinine."

Q. 12. Whose product do you understand is intended when prescriptions are just written "Coco-Quinine?"

A. Lilly's.

Q. 13. Is Coco-Quinine used to a considerable extent or only in small degree in your territory?

A. To a pretty good extent. I buy it in gallon quantities.

Q. 14. How long have you been in the retail drug business?

A. About two years, for myself. I worked in a drug store about three years and then went to school and then came back and opened a drug store for myself.

Q. 15. In what other drug store did you work?

A. The City Drug Store at Fort Gaines, Ga.

Q. 16. Did this drug store handle Coco-Quinine while you were with them?

A. They did.

Q. 17. Did you ever see a prescription written for "Quin-Coco" at either your store or the other store where you worked?

By Mr. Rawle: Objected to as irrelevant.

A. I have not.

Q. 18. Did you ever hear a customer ask for Quin-Coco over the counter?

Same objection.

A. I don't think that I have. I am not positive. I don't think though that I have.

Q. 19. Do you mean that you don't remember ever hearing a customer ask for Quin-Coco?

Same objection?

A. No, sir; I don't remember.

Q. 20. Have you ever had such a preparation offered to you, and if so, will you relate the circumstances and what was said at the time.

A. I had a gentleman, a drummer, to ask me did I need
469 any Coco-Quinine and I made the remark that I didn't know whether he handled Coco-Quinine or not, that I thought Lilly was the only one who made Coco-Quinine. He said that it was the same thing and he gave the name of it, but I don't remember the name he gave.

Q. 21. When was this?

A. I don't remember just exactly the date.

Q. 22. Please state the date as nearly as you can remember.

A. I believe that it was the latter part of last year.

Q. 23. Probably what month?

A. I couldn't say. I can't remember. I hadn't thought of it any more.

Q. 24. Did you buy any?

A. I did not.

Q. 25. Did you buy any other goods of the same drummer at the same time?

A. I did not.

Q. 26. Did he offer you any other goods and if he did can you recall some of the items that he offered?

A. I couldn't say positively, but I am under the impression now that it was Sloan's Liniment or something like that.

Q. 27. Did he offer you any King's New Discovery?

A. I don't remember just exactly.

Q. 29. Have you ever seen the man since?

A. I don't think I have.

Q. 29. Had you ever seen him before?

A. That I couldn't say. I don't know that I had.

Q. 30. Do you handle Sloan's Liniment?

A. I do.

Q. 31. Do you handle King's New Discovery?

A. I do.

Q. 32. From whom do you buy these goods?

A. Lamar, Taylor & Riley Drug Company, wholesale druggists, of Macon, Ga.

Q. 33. Do you know the name of the man who made this proposition to you?

470 A. I don't remember very clearly.

Q. 34. You didn't recall having had any business dealings with him before?

By Mr. Rawle: The further examination along these lines is objected to as leading the witness.

A. No, sir.

Direct examination closed.

By Mr. Rawle: I object to Q. 20 and all questions thereafter, because there is nothing to connect the testimony with the defendant.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 35. How far is Fort Gaines from Macon?

A. A hundred and some odd miles, about a hundred and thirty-five miles, southwest of Macon.

X Q. 36. Do you buy most of your goods from those wholesale druggists, Lamar, Taylor & Riley Drug Co.?

A. Yes, sir, I do.

X Q. 37. You have some financial arrangement with them to that effect, haven't you?

By Mr. Bradford: Objected to as irrelevant, immaterial and improper, and impertinent.

A. I have.
X Q. 38. Are they financially interested in your drug store?
A. No, sir.

Cross-examination closed.

Deposition closed.

S. D. COLEMAN.

Subscribed and sworn to before me this 15th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

471 WILLIAM C. PUMPELLY a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. William C. Pumpelly; age 39; Macon, Ga.; physician.
Q. 2. How long have you been practicing?
A. Between twelve and thirteen years.
Q. 3. Do you use a pharmaceutical preparation known as Coco-Quinine, in your practice?
A. Yes, sir.
Q. 4. Whose product do you recognize Coco-Quinine to be?
A. Lilly & Company.
Q. 5. How do you write your prescriptions?
A. Just "Coco-Quinine."
Q. 6. Whose product do you intend the druggist to understand by such designation?
A. Lilly & Company's Coco-Quinine.
Q. 7. Do you use this preparation regularly and generally in your practice?
A. I use it quite often.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 8. Has there been rather a diminution of malarial disease in this part of the world within the last five years?

By Mr. Bradford: Objected to as not cross-examination.

472 A. I can't say as to that.

Cross-examination closed.

Deposition closed.

WM. C. PUMPELLY.

Subscribed and sworn to before me this 15th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

JOSEPH B. RILEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Joseph B. Riley; age 54; Macon, Ga.; wholesale druggist. I am manager of Lamar, Taylor & Riley Drug Company.
Q. 2. What territory does your company serve?
A. Middle and South Georgia, and a portion of North Georgia.
Q. 3. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?
A. We do. It is the product of Eli Lilly & Company.
Q. 4. How long have you handled this preparation?
A. I would say eight to ten years.
Q. 5. Does your store stock a general line of the products of various manufacturing concerns for which there is a demand in your territory?
A. It is our custom to do it.
Q. 6. Will you please state how you regard the house of Eli Lilly & Company and its preparations?

By Mr. Rawle: Objected to as immaterial.

473 A. I regard them as one of the highest standing and one of the foremost in their line as pharmaceutical manufacturers.

JOSEPH B. RILEY.

Direct-examination closed.

No cross-examination. JOSEPH B. RILEY.

Subscribed and sworn to before me this 15th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

E. G. JACOBS, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. E. G. Jacobs; age 44; Macon, Ga.; wholesale drugs. I am assistant manager of the Lamar-Taylor & Riley Drug Company.
Q. 2. In your position do you have personal knowledge of the sales orders and buying.
A. I do.

Q. 3. Please state as to the demand for Coco-Quinine Lilly, at your store, approximately about what it amounts to?

A. To the best of my knowledge it is about fifty gallons a month.

Q. 4. Do the orders come in from various parts of the territory covered by your store or from special localities?

A. Pretty well scattered throughout the territory.

Q. 5. Have you ever had an order for a product called
474 Quin-Coco and if so, what can you tell us about the demand for this product?

By Mr. Rawle: Objected to as immaterial and irrelevant.

A. We have had an occasional order for Quin-Coco.

Q. 6. Do you fill such orders as you receive?

A. We have possibly marked out a package or two in the last year or two.

Q. 7. Have you ever stocked this preparation, and if so, to what extent?

Same objection.

A. Our records show that we have had two gallons and two five pints, purchased in 1913, from William R. Warner & Co.

Q. 8. Were these gallons and five pint packages sold to supply the demand from your trade?

Same objection.

A. They were.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 9. Approximately how many drug stores are there in the territory that you serve?

A. I am unable to say, I don't know. We cover pretty nearly the entire State of Georgia. Offhand I would say there are probably seven or eight hundred, but there might be fifteen hundred.

X Q. 10. I understand that you carry the Lilly lines of pharmaceuticals and specialties?

A. Yes.

X Q. 11. Do you carry an equally complete line of any other manufacturing concern?

475 A. Yes, we carry a larger and more complete line of Sharpe & Doehme's than we do of Lilly's.

Deposition closed. E. G. JACOBS.

Subscribed and sworn to before me this 15th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Friday, April 16, 1915, at Hotel Piedmont, Atlanta, Georgia, at 9 a. m.

Atlanta, Georgia,
Hotel Piedmont, April 16, 1915, 9 a. m.

Met pursuant to adjournment.
Parties present as before.

WILLIAM B. FRANKLIN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William B. Franklin; age 34; Atlanta, Ga.; retail druggist; manager of Brown & Allen Drug Company, of Atlanta, Ga. I do the buying of all pharmaceuticals and have general supervision of the business. Coco-Quinine is included in pharmaceuticals.

Q. 2. Does your store do a large prescription business?

476 A. We do around a hundred and fifty prescriptions per day on an average the year around.

Q. 3. Are these prescriptions received from physicians generally from all parts of the city?

A. From a general run of doctors all over the city.

Q. 4. Do you handle a pharmaceutical preparation known as Coco-Quinine, and if so, whose product is it?

A. We do, and it is Lilly's product.

Q. 5. How long have you handled this preparation?

A. For eight or ten years. I don't know exactly.

Q. 6. How do your physicians write their prescriptions for this product?

A. For "Coco-Quinine."

Q. 7. Whose product do you understand is intended by the physician when you receive a prescription written "Coco-Quinine"?

A. Lilly's.

Q. 8. Do you dispense this product largely on prescription or partly on call from customers?

A. Both.

Q. 9. How do your customers designate it when they ask for this product?

A. "Coco-Quinine."

Q. 10. Have you ever received a prescription or a call for a product called "Quin-Coco"?

By Mr. Rawle: Objected to as immaterial.

A. I don't know of any such preparation.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 11. How many drug stores are there in this city and suburbs, approxmiately?
A. It is estimated at 256.
X Q. 12. How long since you have personally compounded prescriptions and sold drugs over the counter?
477 A. I still do that sort of work.
X Q. 13. Do you have calls for a chocolate quinine preparation or a sweet quinine or a syrup of quinine or a tasteless quinine from customers?
A. Yes, we have calls for chocolate quinine, and we then dispense Lilly's Coco-Quinine. We have calls for sweet quinine on which we frequently dispense a syrup of quinine made by Sharpe & Doehme, which is not a coco-quinine. I think I have had calls for tasteless quinine, and we dispense on that syrup of quinine of Sharpe & Doehme. We have calls for syrup of quinine and dispense on that Sharpe & Doehme.
X Q. 14. Do you remember calls for a brown syrup of quinine?
A. No.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 15. Is the Sharpe & Doehme preparation you refer to either flavored or colored with chocolate or cocoa?
A. No.

Deposition closed.

W. B. FRANKLIN.

Subscribed and sworn to before me this 16th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

THOMAS C. MARSHALL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupa-
478 tion?
A. Thomas C. Marshall; age 36; Atlanta, Ga.; retail druggist; proprietor of Marshall's Pharmacy. For the last four years I have been in business for myself and prior to that time I was with the Elkin-Watson Drug Company, of this city, one of the largest

drug stores in Atlanta. I had stock in the company and was prescription clerk.

Q. 2. Have you handled a pharmaceutical preparation known as "Coco-Quinine," and if so, whose product do you recognize it to be?

A. I have. It is manufactured by Lilly.

Q. 3. How long have you handled this preparation?

A. For the last twelve or fifteen years.

Q. 4. How is it dispensed in the stores where you have been associated?

A. Principally on prescriptions and over the counter as "Coco-Quinine."

Q. 5. How do physicians usually designate this preparation on their prescriptions?

A. "Cocoa-Quinine, Lilly's," and some call it "Chocolate Quinine."

Q. 6. Do they always write the word "Lilly's" on the prescription?

A. Not always.

Q. 7. Do you have any doubt when a prescription is received written "Coco-Quinine," without the name of the manufacturer, whose product the prescription calls for?

A. No, sir. I understand it means "Lilly's."

Q. 8. Did you ever receive a prescription for "Quin-Coco" or a call from a customer for "Quin-Coco"?

By Mr. Rawle: Objected to as immaterial.

A. No, sir.

Q. 9. When the call is for "chocolate quinine" whose prescription do you understand is intended?

A. Lilly's.

Q. 10. Does your store do a large prescription business?

479 A. About fifty a day.

Q. 11. Did the other store with which you were connected do a large prescription business?

A. Yes; they ran from a hundred to a hundred and fifty a day.

Q. 12. Do the physicians, so far as your experience goes, prescribe Coco-Quinine generally over this city?

A. Yes, sir; they do.

Q. 13. And have they been doing so during the twelve or fifteen year which you say is the period of time you have been dispensing this product?

By Mr. Rawle: This and the previous question is objected to as immaterial.

A. Yes, sir.

Direct-examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. You say you sometimes have calls over the counter for "chocolate quinine." Is that correct?

A. Yes, sir.
X Q. 15. Rather frequently?
A. Well, we have calls for Coco-Quinine—yes, we have calls for chocolate quinine.
X Q. 16. Rather frequently?
A. No, sir.
X Q. 17. How many calls over the counter do you average a week for "Coco-Quinine" or "Chocolate Quinine?"
A. That is a seasonable product. During the winter season we will have two or three calls a day.
X Q. 18. For what is such a preparation used in the winter?
A. Colds.
X Q. 19. How many calls do you average in summer?
A. Not practically any.
X Q. 20. What is the summer use of it?
480 A. For colds, the same as during the winter?
X Q. 21. And for malaria?
A. We don' have any malaria up here.
X Q. 22. Do the doctors ever prescribe "chocolate quinine" in their prescriptions?
A. Not the doctors, usually the laity.
X Q. 23. (Question X Q. 22 repeated.)
A. Not to my knowledge.
X Q. 24. Do you have calls for a sweet quinine or a tasteless quinine or a syrup of quinine, or brown syrup of quinine?
A. We have calls for a tasteless quinine and a syrup of quinine.
X Q. 25. Somewhat frequently?
A. No, sir; not frequently.
X Q. 26. Do you handle a product known as "Quin-Coco?"
A. No.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 27. In your answer to Q. 5 you stated that physicians designate this preparation on their prescriptions as "Coco-Quinine, Lilly's," and "some call it chocolate quinine." In answer to Mr. Rawle's question I understand you to say that the physicians write their prescription for "Coco-Quinine" but that the laity sometimes call for "chocolate quinine." Will you please explain if there is any correction needed to your answer to Q. 5, which I show you?
A. No, I don't think there is any.
R. D. Q. 28. Well, you have said in one place that the physicians do prescribe "chocolate quinine" and in another place that the physicians don't prescribe "chocolate quinine?"
A. I said "usually." The question was "How do physicians usually."
481 R. D. Q. 29. In X Q. 22, Mr. Rawle asked you do the doctors ever prescribe "chocolate quinine" in their prescriptions?

You answer was, "Not the doctors, usually the laity." I merely want to give you an apportunity to straighten out the apparent inconsisteney between these two answers, nothing more?

By Mr. Rawle: Objected to as leading the witness.

A. There is nothing inconsistent about that. Every now and then the physician gets balled up on what he prescribes, but ninety-nine out of a hundred you will see them "Coco-Quinine." If they should prescribe "chocolate quinine" we give them "Coco-Quinine."

Redirect examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 30. Might there not be a larger percentage of prescriptions in which the doctors designate "chocolate quinine?"
A. No, sir.

Deposition closed. THOS. C. MARSHALL.

Subscribed and sworn to before me this 16th day of April, 1915.
CHARLES E. RIORDON,
Special Examiner.

LYNN FORT, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

482 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Lynn Fort; age 45; Atlanta, Ga.; wholesale druggist. I am general manager of the Lamar and Rankin Drug Company.
Q. 2. What territory does your house serve?
A. North Georgia, a small section of Alabama, a small section of Tennessee, also a small section of North and South Carolina.
Q. 3. Do you handle a pharmaceutical preparation known as "Coco-Quinine" and if so, whose product do you recognize it to be?
A. Yes, sir; we handle Coco-Quinine. It is made by Eli Lilly & Company.
Q. 4. How long have you been familiar with this preparation?
A. I have been handling it in a jobbing way for ten years approximately. Prior to that time as a prescription clerk for several years, I don't remember exactly how long. I was prescription clerk in E. J. Eldrige's drug store in Americus, Ga.
Q. 5. Is the demand for "Coco-Quinine" general throughout the territory served by your store?
A. Yes, sir.
Q. 6. So far as you know has your jobbing house ever received an order from the retail trade for a product called "Quin-Coco?"

By Mr. Rawle: Objected to as immaterial.

A. Not that I recall.

Q. 7. Do you stock all pharmaceutical preparations for which there is a demand among the retail trade in your territory?

A. We stock all pharmaceuticals for which there is any appreciable demand.

Direct examination closed.

483 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 8. I take it there may be a demand in your territory for pharmaceutical preparations, which demand is filled direct by the manufacturers? Is that correct?

A. If there is any appreciable demand for the goods the jobber would have some orders for the item.

X Q. 9. (Question repeated.)

A. I don't know how to answer it any better than the answer I gave. It is true that there may be a demand in one locality which might be filled by the manufacturer, or in one town, but if that demand is general throughout the territory the jobber would certainly have orders for the item.

X Q. 10. How many different drug manufacturing concerns have, to your knowledge, salesmen soliciting business for their houses in your territory?

A. I can't answer that. There are quite a number.

X Q. 11. Name those that you know?

A. Parke, Davis & Company, Nelson-Baker & Co., William R. Warner & Co., Frederick Stearns & Company, Sharpe & Doehme, Eli Lilly & Co., the Harvey Company. These are all that I recall. Some of these houses solicit business for direct shipment or shipment through the jobber. Some of the houses solicit business to be shipped through the jobber only.

X Q. 12. Do some of these houses solicit business in your territory, to be shipped direct to the retail druggist, only?

A. Only to what is known as "preferred" customers. The customers that are not classed as "preferred" customers are often shipped through the jobber. This, however, does not apply to the Harvey Company, as they solicit business from the physician, for direct shipment only.

X Q. 13. What do you mean by "preferred" customers?

484 A. It is a class of customers that buy pharmaceuticals in such quantities as to get the benefit of the forty per cent. discount on Part One Products from Parke, Davis & Co., and Sharpe & Doehme.

X Q. 14. You have mentioned Frederick Stearns & Co. Do you know some of the lines manufactured, sold and distributed by that concern?

A. Yes.

X Q. 15. Please name them?

By Mr. Bradford: This line of examination from X Q. 10 is objected to as immaterial and irrelevant and wholly outside of any issue herein.

A. Stearns Wine of Cod Liver Oil; Stearns Headache Wafers.

X Q. 16. (Question repeated.) Please notice that I am asking you for the names of the manufacturing concerns whose lines Frederick Stearns & Company manufacture or distribute?

Same objection, and further because such a question has not previously been asked, and as wholly incompetent, immaterial and impertinent.

A. Frederick Stearns and Company are manufacturers themselves, and the items above mentioned are manufactured by Frederick Stearns & Co.

X Q. 17. Do you believe that Frederick Stearns & Co., manufacture the products known as the "Nyall Products"?

Objection repeated, and the Court's attention is directed to the waste of plaintiff's time and money in wholly irrelevant, immaterial and incompetent examination; also examination that is in no sense cross-examination.

A. I do not know.

By Mr. Rawle: Mr. Rawle calls attention to Q. 7.

X Q. 18. I call your attention to answer to X Q. 11.
485 Please add the names of any other concerns, if you can?

By Mr. Bradford: Objection repeated.

A. That is so broad, sir, that I don't know how to answer it. There are patent medicine houses, jobbing houses, chemical houses, non-secret houses, though the list given above refers to pharmaceutical houses.

X Q. 19. I call your attention to the following pharmaceutical manufacturers: Henry K. Wampole & Co.; Burrows Brothers; Hance Brothers & White; William S. Merrill & Co.; Frederick Ingram, and John Wyeth & Brother. Are these manufacturers and distributors of pharmaceutical preparations and do they or any and which of them employ salesmen in your territory, soliciting the sales of pharmaceutical preparations for their respective houses?

By Mr. Bradford: Objection repeated.

A. Henry K. Wampole & Co., William S. Merrill Chemical Company and John Wyeth & Brother employ salesmen and solicit business in this territory. William S. Merrill & Co., and the Henry K. Wampole Company solicit business for direct shipment and also solicit business for shipment through the jobber. I do not think that Frederick Ingram & Co., Hance Brothers & White or Burrow Brothers travel salesmen in this territory.

X Q. 20. What jobbers of pharmaceutical preparations have traveling salesmen in your territory or part of it, soliciting sales of pharmaceutical products?

By Mr. Bradford: Objection repeated.

A. Solomon & Company, of Savannah; Columbia Drug Company, Savannah; Lamar, Taylor & Riley Drug Company, Macon; Brannon & Carson Company, Columbus, Ga.; Durr Drug Company, Montgomery, Ala.; Greil Brothers Drug Company, Montgomery, Ala.; Doster-Northington Drug Company, Birmingham, Ala.;
486 Bradfield Drug Company, La Grange, Ga.; Curry Arrington Company, Rome, Ga.; Fritz & Weil, Chattanooga, Tenn.; Spurlock, Neil & Co., Nashville, Tenn.; Berry Demovil Company, Nashville, Tenn.; Chapman Drug Company, Knoxville, Tenn.; Sanford Chambers & Alvers Co., Knoxville, Tenn.; Smith Drug Company, Asheville, North Carolina; M. C. Brown, Gainsborough, Ga.; Geer Drug Company, Spartanburg, South Carolina; Murray Drug Company, Columbia, South Carolina; Augusta Drug Company, Augusta, Ga.; Lynn & Finck, New York, N. Y.; McKesson & Robbins, New York, N. Y., and others.

X Q. 21. And these jobbing concerns are all, in a sense, competitors of yours, are they not?

Objection repeated.

A. On some lines, yes.

X Q. 22. Now referring to your answer to Q. 7, in which you say "We stock all pharmaceuticals for which there is any appreciable demand," I take it that there is a large or a very large bulk of pharmaceutical preparations sold in your territory, which does not pass through your jobbing house. Is that correct?

A. There is a good big volume of pharmaceutical business done in our territory that we do not handle. However, where there is any big demand for any particular item in the pharmaceutical line, we necessarily have orders for that item.

Cross-examination closed.

Deposition closed.

LYNN FORT.

Subscribed and sworn to before me this 16th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

487 WALTER R. BELL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Walter R. Bell; age 32; Atlanta, Ga.; traveling salesman for Eli Lilly & Co., covering Northern Georgia.

Q. 2. Please state in reference to the product called "Quin-Coco" and the character of interference you find therefrom in the sales of the Lilly product known as "Coco-Quinine" in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial, as calling for hearsay, and transactions between other parties who are not on the record, and as incompetent.

A. In my territory I find probably twenty-five to thirty per cent. of my trade using Quin-Coco. By their admissions it is used principally as a "replacer" for Coco-Quinine.

By Mr. Rawle: Objection is repeated to the answer and notice given of a motion to strike the same out for the reason stated.

Q. 3. Please state as to the normal demand for Coco-Quinine, in your territory, as to whether it is considerable or limited?

A. Of course in Northern Georgia the demand for an anti-malarial is rather limited, but there is considerable Coco-Quinine used in other conditions. I would say that for this territory the sale on Coco-Quinine is very good.

Q. 4. How do you know that Quin-Coco is used in twenty-five to thirty per cent. of the drug stores in your territory?

Same objections.

488 A. From observation in calling on the trade and seeing Quin-Coco in stock in this proportion of the drug stores.

Q. 5. Have you any personal knowledge of Quin-Coco being used for or sold as Coco-Quinine?

A. I have.

Q. 6. Please explain.

A. In one particular instance I saw the clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine." He was pouring it out of a Quin-Coco bottle into bottles for retail, and labeling these bottles "Coco-Quinine."

By Mr. Rawle: The answer is objected to as res inter alias acta and as incompetent.

Q. 7. Have you ever had druggists admit to you that they sell Quin-Coco, labelled as "Coco-Quinine," and if so, please explain fully?

By Mr. Rawle: Objected to as calling for hearsay, for matters res inter alias acta and as inadmissible.

A. Yes. I purchased a package so labeled and later, on presentation to the druggist, he reluctantly admitted that it was Quin-Coco. This druggist also admitted that such labeling was customary with him.

Q. 8. Have you the bottle in question, and if you have, will you produce it and offer the same in evidence?

Same objection.

A. I have the bottle and here produce it.

By Mr. Bradford: The bottle produced is offered in evidence and marked "Complainant's Exhibit, Bell's Sample Bottle."

By Mr. Rawle: Same objection to the offer.

Q. 9. Do I understand you to say that this druggist admitted selling Quin-Coco under the label that is on this bottle which you have offered in evidence?

489

Same objection and as leading.

A. Yes, I do.

Q. 10. Did he explain why he didn't label it "Quin-Coco?"

Same objection except as to leading.

A. He said there was no demand for Quin-Coco, no call for Quin-Coco, but there was a demand for Coco-Quinine.

Q. 11. Are the conditions relating to the sale of this particular product, which you have related, a fair sample of the conditions that prevail in your territory among the twenty-five to thirty per cent. of the drug stores which you have referred to, as relating to the sale of this particular product?

By Mr. Rawle: Objected to as calling for hearsay, for matters inter alias acta, inadmissible and because samples of facts are not evidence in a court of justice.

A. This particular condition is probably a little more exaggerated than conditions generally in that the druggists are not always quite so free to admit their guilt in substitution.

In a general way, however, I believe this condition is rather usual.

Q. 12. Was this particular druggist asked to testify in this case? I mean the druggist from whom you bought the sample bottle?

A. He was.

Q. 13. What did he say in response to the request?

By Mr. Rawle: This and the preceding question is objected to as inadmissible and this question is objected to for reasons given above.

A. He said that he would not testify, first, because it was none of his business; next that if he could make ten cents on a bottle of Quin-Coco and five cents on a bottle of Coco-Quinine, he would certainly sell Quin-Coco.

490

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. Where is Christian's Drug Store, and where is East Point, Ga.?

A. Christian's Drug Store is in East Point, Ga., a suburb of Atlanta, Ga., with a population of about 2,000 people.

X Q. 15. You testified as to seeing a clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine;" give the name of the drug store and the place and the date?

A. Christian's Pharmacy at East Point, Ga., about three months ago.

By Mr. Rawle: Objected to as irrelevant and immaterial, as calling for hearsay, and transactions between other parties who are not on the record, and as incompetent.

A. In my territory I find probably twenty-five to thirty per cent. of my trade using Quin-Coco. By their admissions it is used principally as a "replacer" for Coco-Quinine.

By Mr. Rawle: Objection is repeated to the answer and notice given of a motion to strike the same out for the reason stated.

Q. 3. Please state as to the normal demand for Coco-Quinine, in your territory, as to whether it is considerable or limited?

A. Of course in Northern Georgia the demand for an anti-malarial is rather limited, but there is considerable Coco-Quinine used in other conditions. I would say that for this territory the sale on Coco-Quinine is very good.

Q. 4. How do you know that Quin-Coco is used in twenty-five to thirty per cent. of the drug stores in your territory?

Same objections.

488 A. From observation in calling on the trade and seeing Quin-Coco in stock in this proportion of the drug stores.

Q. 5. Have you any personal knowledge of Quin-Coco being used for or sold as Coco-Quinine?

A. I have.

Q. 6. Please explain.

A. In one particular instance I saw the clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine." He was pouring it out of a Quin-Coco bottle into bottles for retail, and labeling these bottles "Coco-Quinine."

By Mr. Rawle: The answer is objected to as res inter alias acta and as incompetent.

Q. 7. Have you ever had druggists admit to you that they sell Quin-Coco, labelled as "Coco-Quinine," and if so, please explain fully?

By Mr. Rawle: Objected to as calling for hearsay, for matters res inter alias acta and as inadmissible.

A. Yes. I purchased a package so labeled and later, on presentation to the druggist, he reluctantly admitted that it was Quin-Coco. This druggist also admitted that such labeling was customary with him.

Q. 8. Have you the bottle in question, and if you have, will you produce it and offer the same in evidence?

Same objection.

A. I have the bottle and here produce it.

By Mr. Bradford: The bottle produced is offered in evidence and marked "Complainant's Exhibit, Bell's Sample Bottle."

By Mr. Rawle: Same objection to the offer.

Q. 9. Do I understand you to say that this druggist admitted selling Quin-Coco under the label that is on this bottle which you have offered in evidence?

489

Same objection and as leading.

A. Yes, I do.

Q. 10. Did he explain why he didn't label it "Quin-Coco?"

Same objection except as to leading.

A. He said there was no demand for Quin-Coco, no call for Quin-Coco, but there was a demand for Coco-Quinine.

Q. 11. Are the conditions relating to the sale of this particular product, which you have related, a fair sample of the conditions that prevail in your territory among the twenty-five to thirty per cent. of the drug stores which you have referred to, as relating to the sale of this particular product?

By Mr. Rawle: Objected to as calling for hearsay, for matters inter alias acta, inadmissible and because samples of facts are not evidence in a court of justice.

A. This particular condition is probably a little more exaggerated than conditions generally in that the druggists are not always quite so free to admit their guilt in substitution.

In a general way, however, I believe this condition is rather usual.

Q. 12. Was this particular druggist asked to testify in this case? I mean the druggist from whom you bought the sample bottle?

A. He was.

Q. 13. What did he say in response to the request?

By Mr. Rawle: This and the preceding question is objected to as inadmissible and this question is objected to for reasons given above.

A. He said that he would not testify, first, because it was none of his business; next that if he could make ten cents on a bottle of Quin-Coco and five cents on a bottle of Coco-Quinine, he would certainly sell Quin-Coco.

490

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 14. Where is Christian's Drug Store, and where is East Point, Ga.?

A. Christian's Drug Store is in East Point, Ga., a suburb of Atlanta, Ga., with a population of about 2,000 people.

X Q. 15. You testified as to seeing a clerk in a certain drug store bottling Quin-Coco and labeling it "Coco-Quinine;" give the name of the drug store and the place and the date?

A. Christian's Pharmacy at East Point, Ga., about three months ago.

X Q. 16. And both of your instances relate to Christian's Pharmacy?

A. Both specific instances mentioned, yes.

X Q. 17. How many drug stores in your territory?

A. That would be a guess, probably 250.

X Q. 18. About how often do you visit each of them or make the rounds?

A. About every eight weeks, some oftener.

X Q. 19. How many of them have you visited since the first of March approximately?

A. Approximately half of them.

X Q. 20. Have you any knowledge as to why there is a label on the bottle you produced, partly covering up another label?

A. I don't know that one label is covered. Presumably it isn't covered but in cases where a man buys an old store he simply covers his predecessor's label with his own, a practice very common among retail druggists.

491 X Q. 21. Had the proprietor of Christian's pharmacy taken over that drug store recently?

A. My understanding is that he bought that store about four years ago.

Cross-examination closed.

Deposition closed.

W. R. BELL.

Subscribed and sworn to before me this 16th day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

DISTRICT OF COLUMBIA,
City of Washington, ss:

I, Charles E. Riordon, a Notary Public within and for the District of Columbia, duly appointed Special Examiner by order of Court of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the Plaintiff, in the above-entitled cause, were taken before me pursuant to notice of record as follows:

492 At Detroit, Mich., March 24, 1915:

Rockwell Roman,
William H. Martin,
John M. Francis,
Clifton H. Briggs,
William M. Merithew,
Ernest G. Swift.

At Saginaw, Mich., March 24, 1915:

Albert F. Knowles,
Bertram A. Wright,
Otto Kessler.

At Chicago, Ill., March 25, 1915:

Raoul R. Haas,
Robert A. Havenor,
Cornelius P. Van Schaak.

At Indianapolis, Ind., March 26, 1915:

Walter D. Hoskins.

At Cape Girardeau, Mo., March 27, 1915:

Joseph N. Wolsey,
James A. Kinder,
George W. Walker.

At Cairo, Ill., March 27, 1915:

Harry W. Schuh,
Herbert N. Henckell,
Will J. Bryant,
John B. Messenger.

At Nashville, Tenn., March 29, 1915:

Chesley W. Jennings,
Alva Lee Kelton,
Jerome B. Sand,
Charles L. Koellein,
Gus A. Blodau.

At Memphis, Tenn., March 30, 1915:

Carl O. Manning,
John R. Tague,
493 Robert L. Winchester,
William M. Scott.

At Little Rock, Ark., March 31, 1915:

John B. Bond, Jr.,
Carl Bordeaux,
Samuel V. Bracy,
Stephen D. Knox.

At Alexandria, La., April 1, 1915:

Walter L. Bolden,
Alfred L. Soulier,
R. L. Randolph,
Field V. Grinmellion,
Camille F. Gravel.

At Lake Charles, La., April 1, 1915:

Allen J. Perkins,
Charles C. Broussard.

At Jennings, La., April 2, 1915:

Richard D. Bowden,
Berna C. Fry,
Valleix B. Richard.

At Beaumont, Texas, April 2, 1915:

Wm. C. Chestnutt,
Robert L. Grigsby,
John S. Foster,
Ed. P. Ferguson.

At Houston, Texas, April 3, 1915:

Geo. H. Spurlock,
Wm. A. Schaefer,
Bryan P. Gilmer,
William O. Schuler,
Walter L. Griffin.

At Houston, Texas, April 3, 1915:

Julius R. Prochnow,
Fred B. Burns.

494 At New Orleans, La., April 5 and 6, 1915:

Howard S. Smith,
Charles H. Porter,
Edmund F. Barnes,
Charles C. Broussard (recalled),
Max Samson,
Lucien E. Lyons,

Frank Austin Fitch,
Ralph G. Persell,
Charles Heno,
Harry W. Lyle,
Edmund H. Walsdorf.

At Brook Haven, Miss., April 7, 1915:

Dr. O. H. Arrington,
Sol C. Ray.

At Hattiesburg, Miss., April 7, 1915:

Floyd L. Ames.

At Laurel, Miss., April 8, 1915:

Wesley S. Ames,
Anthony Fly.

At Collins, Miss., April 8, 1915:

Ellis B. Stovall,
O. S. Mayfield.

At Mobile, Ala., April 9, 1915:

Samuel H. Colvin,
Edwin R. Albright,
Quintus S. Adams,
Oscar J. McMillan,
Emmet S. Shepherd.

At Marion Junction, Ala., April 10, 1915:

O. C. Tisdale.

At Cuba, Ala., April 10, 1915:

Amos L. Vaughan.

495 At Birmingham, Ala., April 12, 1915:

Fred R. Daly,
Ezra H. Walker,
Don. J. Barber,
Hill W. Howell,
Merrill P. Northington,
Arrington C. Fancher.

At Montgomery, Ala., April 13, 1915:

Terry T. Greil,
Coleman F. Pearson,
John B. Reid,

John M. Moseley,
William A. Cunningham,
J. Johnston Moore.

At Marshallville, Ga., April 14, 1915:

William A. Jolly.

At Macon, Ga., April 14 and 15, 1915:

R. H. Greene,
John H. Vinson,
Stephen D. Coleman,
Wm. C. Pumpelly,
Joseph B. Riley,
E. G. Jacobs.

At Atlanta, Ga., April 16, 1915:

W. B. Franklin,
Thomas C. Marshall,
Lynn Fort,
W. R. Bell.

That each of said witnesses was by me first duly sworn in accordance with the law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon a typewriting machine from the dictation of said wit-
496 nesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for Plaintiff, and by Mr. Francis Rawle, attorney for Defendant, as appears in the record; that the depositions of each of said witnesses was read over by or to him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit.

I further certify that the exhibits placed in evidence before me in the course of the examination of said witnesses were duly marked by me and in accordance with stipulation of counsel retained by the Plaintiff who introduced same.

In testimony whereof I have hereunto set my hand and seal this 21st day of April, 1915.

CHARLES E. RIORDON,
Special Examiner.

497 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY & COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

Richmond, Virginia,
Jefferson Hotel, May 20th, 1915—10 a. m.

Depositions of Witnesses Taken on Behalf of the Plaintiff, Before Charles E. Riordon, Special Examiner, Commencing Thursday, May 20th, 1915, at Richmond, Virginia.

Met pursuant to agreement of counsel and notice.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

J. L. RIDENOUR, Sr., a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

498 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. J. L. Ridenour; age, 56; Highland Park, a suburb of Richmond, Virginia; Druggist, Manager of the Prescription Department of the Tragle Drug Company, at 817 East Broad Street, this City. The Tragle Drug Company is a retail drug store, one of the largest in Richmond.

Q. 2. How does the prescription business of your store compare with the prescription business of other retail drug stores of Richmond, in volume, or number of prescriptions filled?

A. I think we do equally as much if not more than the average drug store. We fill about fifty prescriptions per day on an average.

Q. 3. Do these prescriptions come to your store from a large number of physicians in this vicinity or from only a few?

A. They come from all over the city. They come from as far as North and South Richmond, from nearly all physicians.

Q. 4. Do you receive prescriptions for a pharmaceutical preparation known as "Coco-Quinine?"

A. Yes, sir.

Q. 5. Are such prescriptions received from a considerable number of physicians in this community?

A. Yes, sir, we have a great many of them, from most all of them. We have a great many, especially in the winter.

Q. 6. How are these prescriptions usually written by the physicians?

A. They are written "Coco-Quinine;" all that I have received. I have never seen them written any other way.

Q. 7. In writing prescriptions for "Coco-Quinine," do the physicians specify "Lilly" or simply write "Coco-Quinine?"

499 A. "Coco-Quinine;" I think mostly written "Coco-Quinine," but I have seen them written "Lilly."

Q. 8. Whose product do you understand the physician intends you to supply on prescriptions written simply "Coco-Quinine?"

A. Lilly's. I know that a doctor when he writes that means "Lilly's."

Q. 9. Have you ever seen a prescription at your store written for a product called "Quin-Coco?"

A. As far as my recollection goes I never have.

Q. 10. How long have you been in your present position as manager of the prescription department for this store?

A. About twelve years.

Q. 11. Have you handled prescriptions for "Coco-Quinine" during all of this period?

A. Yes, sir, I have.

Q. 12. How many prescription clerks are employed in your department?

A. Two only. I only have two. We have assistants sometimes, not all the time. I mean two besides myself.

Q. 13. If prescriptions for "Quin-Coco" were received in your department would you be apt to know it?

A. Yes, sir, I would know it, because I always look over the file. In fact we keep a record of all our prescriptions on our books, refilled and new ones.

Q. 14. Did you ever know of a customer asking for "Quin-Coco" at your store?

A. I think not. I don't remember anyone ever asking for it.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 15. Do you carry "Quin-Coco?"

A. No, sir, we do not. I had one one gallon bottle about

500 four or five years ago and sold it out and I wouldn't get any more because I couldn't sell it, couldn't use it in prescriptions at all. They must have sold it at the counter as we couldn't use it on prescriptions as we never had prescriptions for it.

X Q. 16. When you are at the counter do customers call for "choc-

olate quinine" or "syrup of quinine" or "sweet quinine" or any of those names?

A. I am seldom in the front of the store. I can't remember any such calls when I have been in the front of the store.

X Q. 17. About how many drug stores are there in Richmond and suburbs?

A. I suppose there are seventy-five or eighty of them.

Cross-examination closed.

Deposition closed. J. L. RIDENOUR, SR.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

G. W. BURTON, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. G. W. Burton; age 35; Richmond, Virginia; Druggist, Manager of the Prescription Department of the Childrey Drug Company, of this City.

Q. 2. The Childrey Drug Company, as I understand it, is a retail drug store?

A. Yes, sir.

501 Q. 3. About what volume of business, I mean precription business, does the Childrey Drug Company do, estimated by the number of prescriptions per day or any given period?

A. We fill forty to seventy-five prescriptions a day.

Q. 4. How many prescription clerks are there in your department?

A. We have four registered men including myself.

Q. 5. Do you receive prescriptions from the general run of physicians in this community or from just special physicians?

A. I would say from the large majority of physicians in Richmond.

Q. 6. Do you know anything of a pharmaceutical preparation known as "Coco-Quinine" and if so, what can you tell us about it?

A. I know it as a product of Eli Lilly & Co. It is prescribed for colds, fever, grippe, malaria.

Q. 7. Do the physicians in this community prescribe it quite generally?

A. They do, yes sir.

Q. 8. How do the physicians write prscriptions for "Coco-Quinine?" I mean how do they designate the product?

A. As a rule they write "Coco-Quinine, Lilly". However, we understand when they write "Coco-Quinine," that it is Lilly's and dispense it.

Q. 9. Do the majority of prescriptions specify "Coco-Quinine, Lilly" or are they merely written "Coco-Quinine?"

A. The majority of prescriptions are written "Coco-Quinine" and specify "Lilly's."

Q. 10. Do you receive a good many prescriptions designating the product simply by its name, without the word "Lilly?"

A. Yes, we do.

Q. 11. And whose product do you understand the physician
502 intends when he writes a prescription in this way?

A. Eli Lilly's.

Q. 12. How long have you been manager of the prescription department of the Childrey Drug Company?

A. Six years last February.

Q. 13. Have you been handling prescriptions for "Coco-Quinine" during all of this period?

A. Yes, sir, I have.

Q. 14. Have you ever received a prescription at your store for a product known as "Quin-Coco?" If so, state what you know about it?

A. About six months ago we received a prescription written by Dr. Parker for "Quin-Coco." This is the only one to my knowledge we have ever received for "Quin-Coco."

Q. 15. Have you ever heard a customer ask for "Quin-Coco" at your store?

A. No, sir, I have not.

Q. 16. Do you spend any part of your time in the front of the store waiting on customers, and if so, about what part?

A. Yes, about two hours in the morning, an hour and a half to two hours in the middle of the day, and some time at night.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 17. Do you carry "Quin-Coco" made by William R. Warner & Co.?

A. Yes, sir.

X Q. 18. Do you know the difference between the labels on that product and on "Coco-Quinine" made by Eli Lilly & Co.?

A. I do, yes.

X Q. 19. What class of customers at the counter call for
503 products of this nature, combination of quinine and chocolate? I mean as to age or social conditions or sex.

A. I would say all classes.

X Q. 20. Do they sometimes ask for "chocolate quinine," or a "chocolate quinine preparation?"

A. I don't remember any request of this nature.

X Q. 21. Do they sometimes call for "sweet quinine" or "syrup of quinine" or other names of that sort?

A. We have some calls for "syrup of quinine."

X Q. 22. Any other name called for?

A. I can't recall any other.

X Q. 23. On a call for "Quin-Coco" what would you understand to be meant?

A. A preparation made by Warner.

X Q. 24. Do physicians ever write "chocolate quinine" in their prescriptions?

A. I don't remember of ever seeing such a prescription.

X Q. 25. Has malaria decreased in this part of the world in the last five years?

By Mr. Bradford: Objected to as not cross-examination and as immaterial.

A. Not to my knowledge.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 26. You stated that your store carries "Quin-Coco." Explain for what purpose you carry it?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. About six months ago we had a prescription for "Quin-Coco" and we purchased a small bottle from a wholesale drug house, part of which bottle we still have on hand.

504 R. D. Q. 27. Do I understand from your last answer that you purchased this bottle in order to have some of this product to fill this prescription with?

By Mr. Rawle: Same objection and as leading.

A. We purchased said bottle to fill the prescription in question.

R. D. Q. 28. Have you ever sold any more of the contents of this bottle of "Quin-Coco" than was required to fill the prescription in question?

(Same objection.)

A. No.

Deposition closed.

G. W. BURTON.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

E. C. FISHER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. E. C. Fisher; age, 39; Richmond, Va.; Practicing Physician.
Q. 2. In your practice do you use a pharmaceutical preparation known as "Coco-Quinine," and if you do, whose product do you recognize it to be?
A. I do. Eli Lilly's.
Q. 3. How do you designate this product on your prescriptions?
A. As "Coco-Quinine."
505 Q. 4. Do you ever use the name of the manufacturer in addition to the name of the product? If so, under what circumstances and for what reason?
A. I always specify "Eli Lilly's" if in doubt as to what druggist will fill the prescription.
Q. 5. In what cases do you not add the word "Lilly" to the prescription?
A. In cases where I know the druggist is a reputable prescription druggist and does not substitute.
Q. 6. When you write a prescription and designate the product by its name "Coco-Quinine," only, whose product do you intend this prescription to designate?

By Mr. Rawle: The last two questions and the answers are objected to as irrelevant and immaterial.

A. Lilly's, Eli Lilly's.
Q. 7. How long have you been using "Coco-Quinine" in your practice?
A. Several years.
Q. 8. Do you find it a satisfactory remedy?
A. In cases where it is indicated.
Q. 9. Is it, or is it not, important to the physician that his prescriptions be filled with the product which he designates therein? Give your reasons for your answer.

(Same objections.)

A. Well, a physician certainly would not write for anything he did not want. If the physician wishes his patient to have quinine and writes for same he fully expects the druggist to dispense quinine.
Q. 10. Does it or does it not make any difference to the physician what manufacturer's product is used when a special manufacturer is specified in the prescription?

(Same objections.)

A. We prescribe certain products as the result of the
506 formula which is given us by the manufacturer and expect when we prescribe these products to get this formula. There-

fore we generally specify on our prescriptions the manufacturer of this particular product.

Q. 11. How is substitution by the druggist regarded by the medical profession in this community?

(Same objections and as calling for opinion evidence.)

A. We do everything that we can to prevent it, and if we find a druggist substituting on us we try to keep other prescriptions from going there.

Q. 12. Do you regard it of importance to your practice or to your patients that your prescriptions be filled with the products you specify, and if you do, why?

(Same objections.)

A. It is important to both doctor and patient, for if the druggist substitutes we don't know what results are to be derived from a prescription, as we expect definite results from each drug used in every prescription.

Q. 13. When you fail to get the results expected what or whom do you blame?

(Same objections.)

A. It is hard to answer this question in this particular form.

Q. 14. To be more specific let us suppose that you write a prescription for "Coco-Quinine," believing that this remedy is indicated in a particular case, and your patient after taking the medicine received from the druggist fails to respond to the treatment, in accordance with your previous experience in similar cases, say with the same patient. In such a case where would you place the blame for the failure to get the results desired?

By Mr. Rawle: Objected to as irrelevant and immaterial and to this entire line of examination as futile.

507 A. Either that I had made a mistaken diagnosis, my directions had not been carried out in regard to administering the medicine, or that the druggist had substituted other drugs, or some other preparation, for those prescribed.

Direct examination closed.

No cross-examination.

Deposition closed.

E. C. FISHER.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

WILLIAM S. CAVEDO, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. William S. Cavedo; age, 31; Richmond, Va.; Pharmacist, Manager of the Grant Drug Company, a retail drug store at 7th & Broad Streets, Richmond.

Q. 2. Do you handle a pharmaceutical preparation known as "Coco-Quinine," and if so, whose product is it recognized to be?

A. Yes, we do. It is the product of Eli Lilly & Co.

Q. 3. How long have you handled this product at your store?

A. Since the opening of this store, which was five years ago. Prior to that time I was with T. A. Miller Company, 519 East
508 Broad St., Richmond. I was there eight years and I handled it all during that period I have handled it altogether at least thirteen years.

Q. 4. Do you receive many prescriptions for it at the Grant Drug Company?

A. We receive a great many. I don't know how many, but a whole lot of them.

Q. 5. From physicians generally in this community?

A. Yes, sir.

Q. 6. Does your store handle prescriptions from the general run of physicians of Richmond?

A. Yes, sir, I should say we get prescriptions from at least ninety per cent of the physicians of Richmond.

Q. 7. Did you ever see a prescription written for a product called "Quin-Coco"?

A. No, sir.

Q. 8. Does this answer cover your experience while you were with the T. A. Miller Company as well as your experience with the Grant Drug Company?

A. Yes, sir.

Q. 9. Have you sold "Coco-Quinine" over the counter to customers both at the Grant Drug Company and while you were with the T. A. Miller Company?

A. Yes, sir.

Q. 10. Did you ever hear a customer ask for "Quin-Coco"?

A. No, sir.

Q. 11. How do physicians usually designate this product on their prescriptions?

A. "Coco-Quinine."

Q. 12. Do they follow the name of the product with the name of the manufacturer in some cases, and if so, in about what proportion, roughly speaking?

A. I would say about twenty-five per cent designate "Lilly's" and the other seventy-five per cent simply specify "Coco-Quinine."

Q. 13. Whose product do you understand is intended by the

physician when he simply writes on his prescription "Coco-Quinine," without any other designation?

509 A. Eli Lilly & Company's.

Q. 14. About how many prescriptions does your store fill per day on an average?

A. From seventy-five up per day.

Q. 15. Name a half dozen of the drug stores of Richmond that have the reputation of doing the largest prescription business?

By Mr. Rawle: Objected to as immaterial.

A. The Grant Drug Company. I think we stand first. The Childrey Drug Company, the Tragle Drug Company, the T. A. Miller Company, J. Blair. These I think are the largest.

Q. 16. Do you know Dr. E. C. Fisher?

A. Yes, sir.

Q. 17. How does he rank in the profession among the physicians of Richmond?

A. Very good, very high; he has a good practice.

Q. 18. How many prescription clerks at your store?

A. We have five registered prescription clerks, five registered druggists, including myself.

Q. 19. Do you have personal knowledge of all or practically all of the prescriptions that are received at your store?

A. Practically all of them, yes.

Direct examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 20. Is it not true that chocolate quinine preparations are mostly given to children and that adults usually take their quinine in direct form?

A. Yes.

X Q. 21. Do women and children ask for preparations of this sort at your counter?

A. They ask for "Coco-Quinine," and I always give them that.

X Q. 22. How often do they ask for "chocolate quinine" or "syrup of quinine," or the like?

510 A. I reckon about ten per cent of the time they ask for "syrup of quinine" or "chocolate quinine." I always tell them that I don't have anything but "Coco-Quinine" and give it to them.

X Q. 23. Do the other ninety per cent ask for "Coco-Quinine"?

A. Yes, sir.

X Q. 24. When these customers call for "Coco-Quinine" do they give you the name of the maker of "Coco-Quinine"?

A. The majority of them.

X Q. 25. Do you mean to say that the majority of those who ask for "Coco-Quinine" at your counter, say to you that they want the preparation of that name made by Lilly, or words to that effect?

A. Yes, sir.

X Q. 26. Do you say that your customers when asking for "Coco-Quinine" are careful to add "Lilly"?

A. Yes, sir.

X Q. 27. In what proportion of the cases?

A. In the majority of the cases. The man who uses "Coco-Quinine" knows who makes it as a rule.

X Q. 28. How about the children and the women who ask for it?

A. The women know as much about it as the men. The children, a majority of them have notes from their parents and mostly specify "Lilly's." They always say "Coco-Quinine."

X Q. 29. And you say that they mostly add the word "Lilly"?

A. Yes, sir.

X Q. 30. Do you carry in stock "Quin-Coco, Warner"?

A. No, sir.

X Q. 31. When inspecting a bottle of "Coco-Quinine, Lilly," with its appropriate label, what is there on the label that indicates to you that it is the Lilly product?

A. I always know by the label. "Eli Lilly & Company" is right on the bottom of the label.

511 X Q. 32. Are you familiar with the word "Lilly" on the Lilly labels, printed in red?

By Mr. Bradford: Objected to as irrelevant and immaterial.

A. Very familiar; yes, sir.

X Q. 33. Is that on all Lilly products that you have seen?

Same objection.

A. I think so.

X Q. 34. To your eye is it distinguishing as indicating a Lilly product?

Same objection.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 35. You referred to a "syrup of quinine." What product do you mean by this name?

A. Sharpe & Doehme's syrup of quinine. Febriline is a syrup of quinine but I don't know that it is the same thing as Sharpe & Doehme's.

R. D. Q. 36. Are either of these products colored or flavored with chocolate or cocoa?

A. No, sir.

R. D. Q. 37. What is the color of Sharpe & Doehme's syrup of quinine?

A. Light straw color.

Deposition closed. WILLIAM S. CAVEDO.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet this evening at 8 o'clock at Hotel Virginia, in Emporia, Virginia.

512 Emporia, Va., May 20th, 1915.

Met pursuant to adjournment, and by agreement of counsel proceeded to the residence of witness Albert B. Garber.

Parties present as before.

ALBERT B. GARBER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Albert B. Garber; age 26; North Emporia, Va.; Manager Greenville Drug Company, of North Emporia, Va. I have been in the retail drug business for about eleven years, starting as a clerk in the store of Waynesboro Drug Company, at Waynesboro, Va., where I worked for about three years. I went from there to the store of Goodykoontz Drug Company, at Bluefields, W. Va., where I worked for six months. I went from there to the store of W. E. Armstrong, at Petersburg, Va., where I worked for five months. I then came here and worked for the Greenville Drug Company as a clerk for five years. I then went to school for five months and afterwards took charge of a drug store at Lawrenceville, Va. That was in November, 1913. I came from there here as manager of the Greenville Drug Company, in April, 1915.

Q. 3. Have you handled in your experience as a druggist a pharmaceutical preparation known as "Coco-Quinine?"

A. Yes, sir.

Q. 4. Whose product is this recognized to be?

A. Eli Lilly's.

513 Q. 5. How is this product dispensed by the drug stores with which you have been connected?

A. It is dispensed when called for. For instance, if a person calls for a quarter's worth of "Coco-Quinine" we give it to him and label it "Coco-Quinine." It is also dispensed on prescriptions for "Coco-Quinine."

Q. 6. Do the doctors generally prescribe this preparation so far as your experience goes?

A. We sell more of it to the people direct than we do through the doctors.

Q. 7. But do the doctors prescribe it?

A. Yes, sir.

Q. —. Quite generally?

A. Yes, sir.

Q. 9. In your experience as a druggist have you ever seen a prescription written for a product called "Quin-Coco?"

A. No, sir.

Q. 10. Have you ever had a customer ask for "Quin-Coco?"

A. No, sir.

Q. 11. Have you ever been solicited to buy "Quin-Coco," and if so, by whom and on what representations?

A. I have been solicited by Mr. Moon, representing Warner & Co. I have never come in contact with him misrepresenting it as taking place of "Coco-Quinine." I have always been taught in the drug stores that it is cheaper than "Coco-Quinine," and that is the reason it has been used, at least the men I have been working under for some time have been buying it.

Q. 12. What did Mr. Moon say to you when he solicited your order for "Quin-Coco?"

A. He stated that the store had been buying it in five gallon quantities and wanted to know if he could duplicate the order for the same amount that we had been buying.

514 Q. 13. Did he say anything further?

A. Not that I know of.

Q. 14. Did he say it was the same thing as "Coco-Quinine?"

A. He never mentioned that to me as the store had been using it when I went there.

Q. 15. Do you sell it at your store?

A. Yes, sir.

Q. 16. On what kinds of calls do you dispense "Quin-Coco?"

A. On all calls for "Coco-Quinine," and we label it "Coco-Quinine."

By Mr. Rawle: The question and answer is objected to irrelevant and immaterial and calling for transactions between third parties.

Q. 17. Do you dispense it on prescriptions written for "Coco-Quinine?"

Same objection.

A. Yes, sir.

Q. 18. Why do you do this?

Same objections.

A. The main thing is because we have not got "Coco-Quinine" in the house, and it has been used on account of the cheapness.

Q. 19. Has this practice prevailed in other drug stores where you have worked during the past eleven years?

By Mr. Rawle: Same objections and because the question calls for matters not known to the witness.

A. In one other at Lawrenceville, Va. I don't think that "Quin-Coco" was on the market when I worked at the other stores.

Direct examination closed.

515 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 20. What is the population of Emporia?
A. About three thousand.
X Q. 21. How many drug stores and doctors have you here?
A. Five drug stores and nine doctors.
X Q. 22. What is "Coco-Quinine" or "Quin-Coco" used for chiefly?
A. It is used as an anti-periodic for malaria and for bad colds.
X Q. 23. When customers call for a preparation of this kind do they ask for "chocolate quinine"?
A. They ask for "Coco-Quinine" and "chocolate quinine." Nine-tenths ask for "Coco-Quinine."
X Q. 24. Are you familiar with the labels on the bottles of Lilly's Coco-Quinine and Warner's Quin-Coco?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir.
X Q. 25. Are you familiar with the word "Lilly" in red letters on the Lilly products?

Same objection.

A. Yes, sir.
X Q. 26. Do you consider that a distinguishing mark of their products?

Same objection.

A. Yes, sir.
X Q. 27. You are now being examined while confined to your bed by an injury to your ankle arising from an automobile accident and at the hour of eight o'clock in the evening. Is that correct?
A. That is correct.

Cross-examination closed.

516 Redirect examination.

By Mr. Bradford:

R. D. Q. 28. Has the injury to your ankle referred to in the last question had any effect upon your memory or other mental faculties?
A. No, sir.
R. D. Q. 29. Has it in any way influenced your answers to questions in this deposition?
A. No, sir.
R. D. Q. 30. I take it that in some of the stores where you have been previously employed "Coco-Quinine" was sold. Is that so?

By Mr. Rawle: Objected to as leading and irrelevant.

A. Yes, sir.

R. D. Q. 31. Was it sold under the original Lilly label in the original Lilly package or in prescription bottles?

A. In prescription bottles.

Deposition closed.

ALBERT B. GARBER.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

At the conclusion of deposition of witness Garber, the taking of depositions was continued at the office of the Emporia Drug Company, with parties present as before.

WALTER S. LINDSAY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

517 A. Walter S. Lindsay; age 32; North Emporia, Virginia; pharmacist; Vice-President and Manager of the Emporia Drug Company, retail druggists. I have been in the drug business about eight years in all, and at this store since March 1st, 1911.

Q. 2. Do you handle a preparation known as "Coco-Quinine" and if so whose produce do you recognize it to be?

A. Yes, sir; we handle a produce known as "Coco-Quinine" and recognize it to be a product made by Eli Lilly & Co.

Q. 4. How is this product dispensed at your store?

A. The largest part of it is sold over the counter, I should say about two-thirds sold over the counter and about one-third dispensed on physicians' prescriptions.

Q. 5. In what kind of packages and under what kind of labels is it dispensed?

A. We use the label "Coco-Quinine," with our name on it, "Emporia Drug Company, North Emporia, Va.," put up in our own bottles.

Q. 6. Does your store do a considerable prescription business?

A. Yes, for a town of this size, I should say we do.

Q. 7. Do you receive prescriptions from practically all of the physicians in this community?

A. All of the physicians in this town and also South Emporia and about four physicians in the county adjacent to Emporia.

Q. 8. Do physicians generally in this locality prescribe "Coco-Quinine"?

By Mr. Rawle: Objected to as irrelevant.

A. Yes, sir; and they all write for it by the full name, write the name "Coco-Quinine."

Q. 9. Do you receive some prescriptions written with the name of the manufacturer following the name of the product and if so what proportion are written this way and what proportion are written simply "Coco-Quinine"?

518 A. I don't recall ever seeing the name written after it on prescriptions, because I knew that the doctor meant "Coco-Quinine."

Q. 10. Did you ever have any doubt as to whose product was intended by any prescription written simply "Coco-Quinine"?

A. Not the least in the world, no, sir. That means "Lilly's."

Q. 11. Did you ever receive a prescription written for a product called "Quin-Coco"?

A. I remember once or twice Dr. Lofton here who is connected with this firm, he wrote for it I think once and he said he meant Lilly's preparation, "Coco-Quinine," he just got it backwards. That was about three years ago when I first came here. But since that time he has already written for it as "Coco-Quinine."

By Mr. Rawle: Objected to as irrelevant and hearsay.

Q. 12. Q. 12. Did you ever have a customer ask for "Quin-Coco"?

A. No, sir. They all ask for it as "Coco-Quinine" or "chocolate quinine."

Q. 13. About what proportion ask for "Coco-Quinine" and what proportion for "chocolate quinine"?

A. I don't think I have ever known a white person to ask for it as "chocolate quinine." The negroes often call for it under the name "chocolate quinine." A negro very rarely ever buys over ten cents' worth of it at a time. The "Coco-Quinine," the white people buy from a pint down.

Q. 14. What product do you understand people intend when they ask for "chocolate quinine"?

By Mr. Rawle: Objected to as irrelevant.

A. I always know that they mean "Lilly's Coco-Quinine," because a colored person will bring in his bottle with a "Coco-Quinine" label on it and ask for ten cents' worth of "chocolate quinine."

519 Q. 15. Have you ever handled "Quin-Coco" in your store?

A. Yes, sir. I bought a bill of goods from William R. Warner & Co., on October 2nd, 1914. They had a special price at that time and have now where you bought five gallons of their preparations and at that time to make up an order to five gallons we put in an order for one gallon of "Quin-Coco."

Q. 16. Who sold you this order?

A. Mr. Moon, representative of William R. Warner & Co., who travels this territory for them.

Q. 17. What did Mr. Moon say to you in reference to this product when he solicited your order?

A. Why he said that "Quin-Coco" was the same as "Coco-Quinine"

and cost you a whole lot less. That he had just sold a man up the street five gallons.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 18. Did he give you the formula of "Quin-Coco" or did you know it at the time?

A. No, sir; he did not give me any formula other than he said that it was the same as "Coco-Quinine." I didn't know the formula except that it was a preparation they were selling here to take the place of "Coco-Quinine."

By Mr. Rawle: The last part of the answer is objected to as hearsay.

X Q. 19. Is "Coco-Quinine" generally dispensed for children?

By Mr. Bradford: Objected to as immaterial.

A. My experience has been here that Dr. Lofton in writing for "Coco-Quinine" or medicine for any child he always puts the age of the child on the prescription and I don't remember of him ever writing for it for a grown person.

520 X Q. 20. In what form do adults take their quinine?

Same objection.

A. It looks to me as though that question should be asked the doctor. I ought not to be expected to answer it.

X Q. 21. Was your purchase of "Quin-Coco, Warner," in October, 1914, the first Quin-Coco that you had handled here?

A. To my best recollection the first in about four years. When I came here four years ago there was a five-pint bottle of Quin-Coco in the store, and I don't remember buying any since until I bought this on October 2nd, 1914, although there might have been a bottle bought in the meantime, but I don't recollect buying any except this one bottle on October 2, 1914.

Deposition closed. WALTER S. LINDSAY.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

The witness WALTER S. LINDSAY was excused and immediately recalled by Mr. Bradford, who propounded the following questions:

Q. 22. Did you sell the gallon of "Quin-Coco" which you say you bought last October from William R. Warner & Company, and if so, on what kind of calls and to supply what demand?

By Mr. Rawle: Objected to as irrelevant and immaterial and because the acts of the witness do not affect the rights of the defendant.

A. I sold about half of that gallon and sold it as "chocolate
521 quinine." In the meantime we ran out of "Coco-Quinine" and I used the other half for that purpose, for supplying the demand for "Coco-Quinine."

Q. 23. How was it labeled?

A. On the last half of the gallon we used our regular printed labels "Coco-Quinine."

By Mr. Rawle: Question and answer objected to for the same reason.

Q. 24. I believe you have already testified that when "chocolate quinine" is asked for this means "Coco-Quinine." Am I correct?

By Mr. Rawle: Question objected to as repetition and as irrelevant.

A. Yes, sir.

Cross-examination.

By Mr. Rawle:

X Q. 25. You mean that when you had nothing but "Coco-Quinine" and there was a call for "chocolate quinine" you sold the customer "Coco-Quinine." Is that correct?

A. Yes, that is correct; I sold him "Coco-Quinine" when he called for "chocolate quinine."

Deposition closed.

WALTER S. LINDSAY.

Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

LE GRAND E. WETZEL, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

522 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Le Grand E. Wetzel; age 39; Richmond, Va.; traveling salesman for Eli Lilly & Co., covering south-eastern Virginia.

Q. 2. What are your duties as traveling salesman for Eli Lilly & Co.?

A. Selling their products to the retail drug trade and dispensing physicians, and also detailing physicians. By "detailing physicians" I mean leaving samples and literature of our various specialties, and explaining the merits of them to the best of my ability.

Q. 3. Please explain in relation to the trade in the Lilly specialty known as "Coco-Quinine" in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial and vague.

A. When I first went with Lilly & Co., nearly ten years ago, this specialty had a fair sale in this territory, but by hard work among the physicians we succeeded in creating a very large demand. There is hardly a physician or druggist in this territory that has not been sampled and talked to in regard to "Coco-Quinine." The demand has increased enormously and we regard it as one of our best sellers.

By Mr. Rawle: The answer is objected to as irrelevant and immaterial.

Q. 4. What do you know, if anything, concerning a product called "Quin-Coco"?

A. This product is sold throughout my territory in considerable quantities to some of the druggists who use it as a substitute for "Coco-Quinine," which undoubtedly has hurt the sale of "Coco-Quinine."

By Mr. Rawle: Objected to as irrelevant and immaterial and as hearsay and as referring to matters that do not affect the defendant.

523 Q. 5. On what information or knowledge do you base the statements in your last answer?

By Mr. Rawle: Objected to as calling for hearsay and for evidence based on information and for matter which can not affect the rights of the defendant.

A. By seeing packages of "Quin-Coco" on the shelves of the druggists and yet you can't find any physician who writes for it, and the druggists themselves admit that the public know nothing about "Quin-Coco."

By Mr. Rawle: What the druggists admit is objected to as inadmissible and hearsay, and the entire answer is objected to for the same reasons as the question.

Q. 6. Do you have access to the prescription departments of the retail drug stores in your territory?

By Mr. Rawle: Objected to as irrelevant.

A. Yes.

Q. 7. In about what proportion of the retail drug stores in your territory have you personally seen bottles of "Quin-Coco" in the prescription departments?

A. At last forty per cent.

Q. 8. Have you ever discussed the sale of "Quin-Coco" with any of the druggists who handle it and if you have can you repeat what some of these druggists have said to you on the subject?

By Mr. Rawle: Objected to as calling for hearsay and as calling for matter between third parties which can not bind the defendant and because no act of druggists in respect to the matters inquired of can affect the defendant's rights.

A. I have discussed it with a number of them and invariably they answered that their only reason for selling "Quin-Coco" is because they can buy it cheaper than "Coco-Quinine."

524 Q. 9. Have any of them or a considerable number of them admitted to you that they sell it on calls and prescriptions for "Coco-Quinine"?

By Mr. Rawle: Same objections.

A. Yes, several; not only admit that they sell it on prescriptions and calls for "Coco-Quinine", but do not hesitate to label it "Coco-Quinine".

Q. 10. About how many drug stores in your territory?

A. Approximately three hundred and fifty. This is just an estimate, I don't know positively.

Q. 11. Are you familiar with the reputation and character of business of the majority of drug stores in your territory?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. I am.

Q. 12. Which are the leading prescription drug stores of Richmond, Va.? Name four or five.

Same objection.

A. The Grant Drug Company; the Childrey Drug Company; Tragle Drug Company; W. P. Poythress & Company; the Polk Miller Drug Company.

Q. 13. How does Dr. E. C. Fisher stand in the medical profession at Richmond, Va.?

Same objection.

A. He stands very high.

Q. 14. What are the leading prescription drug stores of Emporia, this city?

Same objection.

A. The Greenville Drug Company and the Emporia Drug Company.

Q. 15. What are the leading drug stores of Norfolk, Va.?

Same objection.

525 A. Burrow, Martin & Co.; F. D. Nelliger; H. A. Arrington; E. F. Truitt; and Sterling's Pharmacy.

Q. 16. Do you know anything about a preparation known as "syrup of quinine" and if so, what can you tell us about it?

A. There is a preparation made by all pharmaceutical houses that is now labeled "Syrup of Cinchona Alkaloid." This syrup was formerly labeled "Syrup of Quinine, Tasteless", and was so known to the public. On the passage of the Pure Food and Drug Act of 1906, there being no quinine in the preparation the label had to be

changed as there was no quinine in the syrup, it only contained some of the minor alkaloids of the cinchona bark.

Q. 17. What is its color and flavor?

Same objection.

A. It is a white syrup with a white alkaloid suspension, and it is flavored by most houses with lemon.

Q. 18. In your work as a salesman for Eli Lilly & Co., among the drug trade and in detailing physicians, have you ever heard a physician express any knowledge of the product called "Quin-Coco"?

By Mr. Rawle: Objected to as calling for hearsay.

A. Only one who admitted to me that he allowed it to be used in his prescriptions and he at the same time said that he realized that it was not right, but he is a part owner of the drug store and wanted to make all the profit possible.

Q. 19. What was your employment prior to your employment by Eli Lilly & Co.?

A. Manager of the laboratories of the Powers-Taylor Drug Company, of Richmond, Va.

Q. 20. Were you ever in the retail drug business?

A. Yes, for four years.

Direct-examination closed.

526 Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 21. About how often do you visit the druggists in your territory?

A. About once in six weeks.

X Q. 22. Have you since March 15th, visited all or nearly all of them?

A. I should say that I have visited the larger per cent. of those in the territory that I call on. There are some in the territory that I don't call on.

X Q. 23. About what percentage of all of the drug stores in your territory do you never call on?

A. There wouldn't be over five per cent.

X Q. 24. About what percentage of the physicians in your territory that you know of sell their own drugs, more or less, either themselves or in connection with a drug store?

A. Not over five per cent.

X Q. 25. You have referred to syrup of quinine made by a number of drug houses. How many make it or have made it?

A. So far as I know all houses that are recognized as pharmaceutical canufacturing houses do make this article.

X Q. 26. Is it made on the same or substantially the same formula in a medicinal sense?

A. Presumably so; we presume it to be the same formula, the same medicinal strength. There are two strengths made by nearly

all of the houses. One is labeled "two grains to the dram" and the other is labeled "five grains to the dram".

X Q. 27. Does Lilly sell this preparation and has he been doing so for years?

A. Yes, sir.

X Q. 28. Have you ever seen on druggists' shelves bottles of this preparation made by different drug houses?

A. I have.

527 X Q. 29. Is it a somewhat common thing to see it?

A. Yes, sir.

X Q. 30. And perhaps you have sometimes tried to sell a druggist Lilly's preparation of that article when the druggist had been handling some other drug house's preparation. Is that correct?

A. Yes, sir.

X Q. 31. Is that a common thing to happen?

A. It is, because we recognize it as an open formula.

X Q. 32. What do you mean by an "open formula?"

A. One with no individuality and made by all the houses.

X Q. 33. What do you mean by "one with no individuality?"

A. Because it is a suspension of an alkaloid of cinchona bark in simple syrup and can be made by anybody.

X Q. 34. I take it that you are constantly soliciting from druggists the sale of Lilly preparations which druggists already have or have been previously handling correspondingly similar or substantially identical preparations of other drug houses? Is that correct?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. Only so far as that applies to open formula, we never offer anything as substitutes.

X Q. 35. When two drug houses sell the same preparation on an open formula wouldn't they be substitutes for each other?

A. Not by any means. If a physician specifies anything made by one particular house and was supplied goods made by another house of same formula, that might be termed "substitution."

X Q. 36. Would you so term it?

A. I certainly would.

X Q. 37. Then there is no reason for saying that "substitution" as you call it, can not be practiced by druggists in dispensing

528 what you call "open formula preparations?"

A. "Substitution" can be practiced on open formula preparations where one particular make is prescribed for reasons perhaps best known to the doctor and his prescription is filled with another make.

X Q. 38. Isn't it true that any thoroughly equipped drug store has a number or a large number of open formula preparations in respect of which the druggist could, if he were evilly minded, practice what you call "substitution?"

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. He certainly could, as there are a number of open formula preparations of identical color, odor and taste.

X Q. 39. And when you find that one of your druggists is handling one of such open formula preparations made by another drug house, you do not hesitate to urge him to buy and handle Lilly's similar preparation, do you?

By Mr. Bradford: Objected to as immaterial and irrelevant.

A. My instructions from the home office is not to offer any of our products as a substitute for any similar preparation made by a competing house, as it is our intention to market our goods on their own merits.

By Mr. Rawle: The answer is objected to as irresponsive and irrelevant and immaterial.

X Q. 40. (Question repeated.)

A. If it is an open formula preparation I offer the Lilly product for sale.

X Q. 41. Then you would be offering such druggist a preparation which you have just testified he could use if he were evilly minded as a substitute for a similar preparation made by another house?

529 By Mr. Bradford: Objected to as irrelevant and immaterial.

A. No, that is not correct. On all open formula preparations made by the several pharmaceutical houses, it is not a question of who made it, either by the physician or the public, but it is the formula that they want.

X Q. 42. But if a physician specifies an open formula preparation and writes "Parke, Davis" and the druggist fills it with the same open formula preparation made by Lilly, you say that that would be substitution by the druggist, do you not?

A. I certainly do.

X Q. 43. And you also say that in cases of open formula preparations you do not hesitate to solicit the sale of Lilly's open formula preparations although the druggist has already the same open formula preparation made by another house and although you know and admit that if the druggist were evilly minded he could substitute on prescriptions in the way you have just qualified as wrong. Am I correct?

By Mr. Bradford: Same objection to this question and also to X Q. 42.

A. No, sir. When we offer the open formula made by Eli Lilly & Co., we do not want the druggist to use it where Parke, Davis, or any other make open formula has been specified.

X Q. 44. (X Q. 43 repeated.)

Same objection.

A. We do offer preparations of open formula to the retail druggists such as made by other houses but with the understanding that they are to be supplied when Lilly's is specified or he can sell same where there is no specification.

X Q. 45. Could you give me any estimate of the number of open formula preparations which are sold by the best drug houses which fairly come within the class which we have just been dis-
530 cussing? Would there be ten such, or a hundred such, or more?

Same objection.

A. There would be a great many more.

X Q. 46. Five hundred?

Same objection.

A. Our catalogue carries about approximately five thousand items. I think at least five hundred of them would be open formula.

X Q. 47. And these five hundred are probably made by one or more of the other leading drug houses?

Same objection.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 48. In Mr. Rawle's questions relative to syrup of quinine you have answered as if this product was still labeled "syrup of quinine." I understood in your direct examination that such labeling had been discontinued under the provisions of the Pure Food and Drugs Act. Do I understand then in your answer to Mr. Rawle's questions you refer to this product meaning syrup of cinchona alkaloid?

A. Yes, sir.

R. D. Q. 49. As a part of your business do you seek to develop a demand for the Lilly open formula preparations as well as the other Lilly preparations by presenting the merits of such preparations to the physicians and seeking to induce the physicians to use them?

A. I do.

Deposition closed.

L. E. WETZEL.

531 Subscribed and sworn to before me this 20th day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet tomorrow, Friday, May 21st, 1915, at 10 o'clock at Hotel Fairfax, Norfolk, Virginia.

Norfolk, Virginia, May 21, 1915.

Met pursuant to adjournment and by agreement of counsel proceeded to the office of the Sterlings Pharmacy.

Parties present as before.

EDGAR B. ALLEN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Edgar B. Allen; age 44; Norfolk, Va.; pharmacist; one of the proprietors of the Sterlings Pharmacy.

Q. 2. Do you handle a preparation known as "Coco-Quinine," and if so, whose product do you recognize it to be?

A. We have handled "Coco-Quinine" for the past thirteen years and recognize none other except that made by Eli Lilly & Co.

Q. 3. How do you dispense it?

A. We don't dispense it at all except as "Coco-Quinine" on prescriptions and on calls for "Coco-Quinine," very little of the latter. Our work is chiefly prescription work.

532 Q. 4. How do physicians write prescriptions for this product?

A. For "Syrup of Coco-Quinine, Lilly" and for "Syrup of Coco-Quinine," without the word "Lilly." And just the word "Coco-Quinine."

Q. 5. When a prescription comes to your store written for "Coco-Quinine," without any other specification, whose product do you understand the physician intends?

A. We only know one "Coco-Quinine," and that is Lilly's.

Q. 6. Have you ever received a prescription for a product called "Quin-Coco"?

A. I have not.

Q. 7. Have you ever had a customer call for "Quin-Coco"?

A. I have not.

Q. 8. Do you receive prescriptions from a considerable number of physicians or only a few?

A. Our prescription business covers between thirty and thirty-five physicians.

Q. 9. Do the most of them use "Coco-Quinine" in their practice.

A. They all use some, and some use a great deal.

Q. 10. Have you ever been solicited to buy the product called "Quin-Coco" and if so by whom, and what did he say?

A. Mr. Moon, the representative of William R. Warner & Co., on several occasions has offered us a preparation which he called "Quin-Coco," which he stated we could use the same as "Coco-Quinine," and that it would be almost impossible to tell it from "Coco-Quinine."

Q. 11. Who did he say, if any one, could not tell it from "Coco-Quinine"?

A. That the physician couldn't distinguish it, that the products were identical.

Q. 12. Did he say whether or not the patient could tell the difference.

533 A. The patient would be impossible to tell the difference for the reason that the patient don't know what he is getting.

Q. 13. Can you tell when or about when Mr. Moon made these statements to you?

A. It was at different times during the past two years, on his visits here, but the exact dates I do not know.

Q. 14. Do you recall Mr. Moon's exact words in making these statements?

A. No; but as near as I can remember as to what he said. As to his exact words it would be impossible to state.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 15. Is it the case that "Coco-Quinine" is chiefly prescribed for children and straight quinine mostly for adults?

By Mr. Bradford: Objected to as immaterial and also because this witness has not qualified as a physician to answer such questions.

A. In very few cases "Coco-Quinine" is used alone. When it is used alone it is used for children or infants. In adult cases it is used in combination with quinine, phenacetin and kindred drugs.

X Q. 16. How many drug stores are there in Norfolk and suburbs?

A. I suppose in the neighborhood of sixty.

X Q. 17. When did Moon first call on you and offer you Warner's products?

A. Mr. Moon has been calling on us during the past, I suppose, four or five years. I couldn't tell you exactly. He comes about twice a year, and we purchase from him his line of goods.

X Q. 18. Did Mr. Moon at each of these calls take up "Quin-Coco" with you?

534 A. He went through his catalogue of pharmaceuticals showing us products made by William R. Warner & Co., among which was "Quin-Coco."

X Q. 19. Have you in your mind in testifying a distinct recollection of any one interview and as to what he said then and his words or have you given only a general impression that he left on your mind at a number of these calls.

A. On his visit about one year ago he called our attention to "Quin-Coco," Elaborating upon its pharmaceutical qualities, and stating the same was a product practically identical with Lilly's Coco-Quinine, and that same could not be distinguished from it.

On the visit during May of this year, 1915, in talking of chocolate quinine syrups, he again stated that he had as good a piece of goods as Lilly's and one that could be used for all purposes that "Coco-Quinine" could be used.

X Q. 20. Have you now given the conversation between you on the subject at these two calls?

A. As near as I can remember it.

X Q. 21. In your dealings with Moon have you regarded him as a square man?

A. I always found Mr. Moon a perfectly reliable straightforward business man.

X Q. 22. I take it that filling a prescription with a drug other than the one specified by the physician is not honest work and of course you do not do it? Is that correct?

A. It is.

X Q. 23. Did you understand at these two conversations that Moon was making a suggestion to you that you would buy his "Quin-Coco" and use it dishonestly?

A. Mr. Moon has always known that we do not substitute in any case and that we only fill prescriptions as written and with the identical drugs prescribed by the physician, and he also knew that he could not sell us "Quin-Coco" for we had told him on
535 his first visit that we had never handled anything but Lilly's "Coco-Quinine." Consequently I do not believe he was suggesting to me a substitute.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 24. Having no demand for "Quin-Coco" either from physicians or the laity, as you have already testified, how did Mr. Moon suggest or suppose you would dispose of the "Quin-Coco" if you purchased it on his representations? Or do I understand that he did not really solicit your order but told you of its virtues and possibilities? Please explain more fully your understanding of the matter.

By Mr. Rawle: Objected to as not proper for re-direct, the witness having testified to conversations; as improper because the only proper question is to ask as to what was said; and as leading.

A. Mr. Moon and the salesman with him, I don't know this salesman's name, on his last visit here, solicited our business on "Quin-Coco" with a statement that we might have calls for syrup of chocolate quinine for which it could be dispensed. The sale-man with Mr. Moon was very insistent in getting us to put it in.

R. D. Q. 25. On Mr. Moon's visit when he first offered you "Quin-Coco," was he alone?

A. He was.

R. D. Q. 26. And at that time as I understand your deposition he stated that it was practically identical with Lilly's Coco-Quinine and could be used the same as Lilly's Coco-Quinine, and that the physician could not tell the difference. Is this correct?

By Mr. Rawle: Objected to as not re-direc- examination and as grossly leading.

536 A. Mr. Moon not knowing on his first visit our objection to substitution, did offer us "Quin-Coco," but we refused to buy same. He at that time stated "Quin-Coco" was a preparation which could be dispensed in place of "Coco-Quinine."

R. D. Q. 27. And that the physician could not tell the difference?

A. Yes, he did.

By Mr. Rawle: The question is objected to for the same reason as last above given.

Re-direct-examination closed.

Recross-examination.

By Mr. Rawle:

R. X Q. 28. You have on cross-examination more particularly referred to two specific interviews with Moon, one of which was in May, 1915, and the other about a year before. In answer to R. D. Q. 26 you refer to his first visit. What I want to know is whether the first visit was an earlier visit than the two visits, one in May, 1915, and the other about a year before?

A. As near as I can recollect this conversation occurred on the first visit of Mr. Moon when he had "Quin-Coco" for sale, which was previous to the two last visits spoken of.

R. X Q. 29. You testified in answer to X Q. 23 that "Mr. Moon has always known that we do not substitute in any case." Have you any doubt that when Mr. Moon first called on you he knew the high reputation you had as a druggist in this community?

A. Mr. Moon came to us a perfect stranger and I do not know what he thought our standing as to substitution was. But from his conversation at that time he led us to believe that we could use "Quin-Coco" instead of "Coco-Quinine" without detection.

R. X Q. 30. But I point out to you again that in answer to X Q. 23 you said that "Mr. Moon has always known that we do
537 not substitute in any case," and ask you if that is what you mean to testify?

By Mr. Bradford: Objected to as the witness has already explained what he meant.

A. Our conversation with Mr. Moon on his first visit to us was such that he could make no sales on any product which could be used as a substitute.

R. X Q. 31. Did you understand that at that first conversation

Moon was making a suggestion to you that you should buy his "Quin-Coco" and use it dishonestly as a druggist?

By Mr. Bradford: Objected to as the witness has already testified as to how Moon suggested it could be used, and the question of whether it was honest or dishonest is a question for the court and not for the witness.

By Mr. Rawle: The interference by opposing counsel with the cross-examination is objected to and protested against. Such objections have no place in the cross-examination of the witness.

By Mr. Bradford: As to this it is also a question for the court and not for the decision of defendant's counsel.

A. Mr. Moon suggested that we use it. As to the honesty it is up to the druggist.

R. X Q. 32. Haven't you on your shelves in the drug store where we are now sitting, a considerable number, or a large number of identical or quite similar pharmaceutical preparations made by different drug houses respectively, which identical or very similar preparations could be medicinally used one for the other in a proper case?

By Mr. Bradford: Objected to as immaterial and irrelevant and not cross-examination.

A. In the drug store we carry a great many products the formulas of which are identical and which are called similar articles,
538 the formulas of which are taken from the United States Pharmacoepae or from the National Formulary. These preparations are made by a number of houses and are used without reference as to the name of the manufacturer. We also carry a great many preparations known as proprietaries, some of which are similar or identical in composition, but which carry trade names placed on same by the manufacturer. A physician in prescribing for these proprietaries uses the trade name, and we feel compelled and do only use on such prescriptions the article called for by trade name and not an article of similar chemical construction made by another manufacturer, claiming that the physician has a perfect right to call for drugs under trade marks and that we have no right to substitute anything else for same.

R. X Q. 33. Then you do carry in stock certain proprietary medicines made by more than one drug house which are substantially or entirely similar to each other? Is that correct?

Same objection.

A. Yes.

R. X Q. 34. Could you give me any estimate of the number of such? Whether a dozen or fifty.

Same objection.

A. Among the manufacturers we have a number of houses which make it a business to offer formulas which they claim to be practically

the same as trade marked formulas and they advocate the use of same. As to the number of such preparations I judge we may carry twelve or fifteen, and they are only used when the physician writes for them under the name by which the manufacturer who makes them places them on the market.

R. X Q. 35. Give me an estimate of about how many drug houses products having open formulas taken from the N. F. or U. S. P., you carry?

Same objection.

539 A. About five hundred.

R. X Q. 36. And these are practically interchangeable on prescriptions, in a proper case, are they not?

Same objection.

A. Where the physician fails to specify the name of the manufacturer and uses only the letters U. S. P. or N. F., we feel at liberty to use drugs made by any manufacturer of standard repute.

Deposition closed.

EDGAR B. ALLEN.

Subscribed and sworn to before me this 21st day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

At the conclusion of deposition of witness Allen proceeded to the Hotel Fairfax where the taking of depositions was continued, with parties present as before.

F. D. NELLIGAR, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. F. D. Nelligar; age, 40; Norfolk, Va.; Pharmacist; Proprietor of Nelligar's pharmacy at No. 453 Church St., Norfolk, Va.

Q. 2. Do you do a large prescription business?

A. Yes, fairly.

Q. 3. One of the leading prescription stores of the city?

A. Yes.

540 Q. —. Do you handle a preparation known as "Coco-Quinine," and if you do, whose product do you recognize it to be?

A. We do. It is Eli Lilly & Company's product.

Q. 5. Do you receive prescriptions for this product at your store?

A. I do.

Q. 6. Are these prescriptions written by a large number of physicians or by only a few?

A. By the majority.

Q. 7. How do the physicians generally designate this product on their prescriptions?

A. They prescribe "Coco-Quinine" and follow it with the name "Lilly." Some just write "Coco-Quinine," but the majority specify "Lilly's."

Q. 8. Whose product do you understand is intended when a prescription is written merely "Coco-Quinine"?

By Mr. Rawle: Objected to as irrelevant.

A. Lilly's.

Q. 9. Do you sell this product over the counter at your store to the laity?

A. Yes.

Q. 10. In what character of packages and under what kind of labels is it usually dispensed?

A. We usually label the package "Coco-Quinine" unless the customer asks for "chocolate quinine" and then we write "Chocolate Quinine." We dispense it in our own bottles, from bulk packages.

Q. 11. Have you ever had a prescription at your store for a product called "Quin-Coco"?

A. No.

Q. 12. Have you ever had a customer ask for "Quin-Coco"?

A. No.

Q. 13. How long have you been handling "Coco-Quinine"?

A. Since it first came out, I don't remember how long, about four or five years.

541 Q. 14. Do you have knowledge of all or substantially all of the prescriptions that are received at your store?

A. All.

Q. 15. Have you ever been solicited to buy "Quin-Coco," and if so, by whom?

A. Yes, by Victor M. Moon, representative of William R. Warner & Co.

Q. 16. What did Mr. Moon say to you on this subject when he offered you "Quinn-Coco"?

A. "This is a product identical in composition and physical appearance with 'Coco-Quinine' of Lilly's, but is much more economical."

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 17. When did he say that?

A. Eact time he visited the store.

X Q. 18. How many times and during how many years has he visited you?

A. During a period of three years, about four times each year.

X Q. 19. Do you handle Warner's line of goods?

A. Yes.

X Q. 20. Have you handled "Quin-Coco"?
A. No, not to my knowledge.
X Q. 21. You say that Moon has visited you about twelve times, in three years. To which of the interviews did you have reference when you just stated what he said to you?
A. I think he spoke of it every time he called.
X Q. 22. In precisely the same words?
A. Well, yes, perhaps the phraseology was different but they had the same meaning.
X Q. 23. Did he exhibit a bottle of "Quin-Coco" to you?
A. Yes, each time.
542 X Q. 24. So that you physically observed the similarity of physical appearance between the two products, did you?
A. Yes.

Deposition closed.

F. D. NELLIGAR.

Subscribed and sworn to before me this 21st day of May, 1915.
CHARLES E. RIORDON,
Special Examiner.

HARRY S. ARRINGTON, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Harry S. Arrington; age 39; Norfolk, Va.; Pharmacist, Proprietor of Arrington's Pharmacy, 244 Church St. I have been located at my present store for about eleven years and was located across the street from there for about six or seven years previous.
Q. 2. Does your store do a comparatively large prescription business?
A. Yes, sir, I do a pretty large prescription business. I suppose we fill in the neighborhood of ten thousand prescriptions a year on an average.
Q. 3. As I understand it you are the President of the Virginia State Board of Pharmacy. Is this correct?
A. I am.
Q. 4. At your store do you handle a product known as "Coco-Quinine"? And if so, whose product do you recognize it to be?
A. "Coco-Quinine" is Eli Lilly & Co's. product and we do
543 handle it. I suppose we have handled it for four or five years.
Q. 5. Do the physicians generally prescribe this product?
A. Yes.
Q. 6. How do they designate it in their prescriptions?
A. They write it "Coco-Quinine" and some add the name "Lilly" in parenthesis.
Q. 7. When you receive a prescription written simply "Coco-

Quinine," whose preparation do you understand the physician intends you to supply?

A. I supply Eli Lilly & Company's because I haven't any other chocolate syrup of quinine, that is with a chocolate base.

Q. 8. Did you ever know of any chocolate syrup of quinine prior to the introduction of "Coco-Quinine" by Eli Lilly & Co.?

A. I can't say that I did.

Q. 9. Did you ever know of any other manufacturer's product under the name "Coco-Quinine"?

A. No, sir.

Q. 10. When you receive a prescription written "Coco-Quinine," do you have any doubt that the physician means Lilly's Coco-Quinine?

A. I couldn't say what they mean other than if they prescribe "Coco-Quinine" I would suppose they meant Eli Lilly & Company's, not knowing of any other Coco-Quinine.

Q. 11. Did you ever receive a prescription at your store for a product called "Quin-Coco"?

A. No, I never have.

Q. 12. Did you ever have a call from a customer for "Quin-Coco"?

A. Never for "Quin-Coco," no, sir.

Q. 13. How do you put up "Coco-Quinine" at your store for dispensing purposes?

544 A. In the amount the physician usually writes for, in our own bottles, under our own labels.

Direct-examination closed.

Cross-examination.

By Mr. Rawle:

X Q. 14. Did you ever dispense a chocolate quinine preparation of your own make?

A. No, sir.

X Q. 15. Do you have any calls over the counter for "chocolate quinine" or "syrup of quinine," or the like?

A. Yes, sir; I have had calls for "chocolate quinine," "chocolate syrup of quinine," and "tasteless syrup of quinine."

X Q. 16. Are such calls common?

A. Yes, sir.

X Q. 17. What proportion would they bear to calls for "Coco-Quinine," specifically?

A. I suppose it is called for as "chocolate quinine" or "tasteless syrup of quinine." Probably three to one or two to one are for "Coco-Quinine." In other words possibly one-quarter to one-third of the calls may be under those other names.

X Q. 18. Do you handle "Quin-Coco" made by Warner?

A. No, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 19. Are the calls for "chocolate quinine," etc., from the same people who have been accustomed to using "Coco-Quinine"?
A. I couldn't say. If they ask for "chocolate quinine" I give them Eli Lilly's because I haven't anything else. If they ask for
545 "tasteless syrup of quinine" I give them the tasteless syrup of quinine known as "Febriline." Then there is a syrup of cinchona alkaloid, which is called a tasteless syrup of quinine made by Sharpe & Doehme. Neither of these two contain chocolate.

Deposition closed.

HARRY S. ARRINGTON.

Subscribed and sworn to before me this 21st day of May, 1915.

CHARLES E. RIORDON,
Special Examiner

At the conclusion of the deposition of witness Arrington proceeded to the office of Dr. Edward T. Hargrave, where Dr. Hargrave's deposition was taken, with parties present as before.

Dr. EDWARD T. HARGRAVE, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?
A. Edward T. Hargrave; age, 44; Norfolk, Va.; Physician.
Q. 2. In your practice do you prescribe a preparation known as "Coco-Quinine," and if you do, whose product is it?
A. Yes, it is Eli Lilly & Company's product.
Q. 3. How do you usually designate this product on your prescriptions?
A. "Coco-Quinine."
546 Q. 4. Do you usually specify "Lilly," and if not, why not?
A. No, I expect the druggists to give me "Lilly's" when I write for "Coco-Quinine," because they are the only people I know in connection with "Coco-Quinine."
Q. 5. Do you find Lilly's "Coco-Quinine" a satisfactory preparation in the treatment of cases where it is indicated?
A. Yes.
Q. 6. Is it or is it not important that the physician should have his prescriptions filled with the drug specified on his prescription?
A. It is. The reason is because substitution is dangerous.
Q. 7. Can you elaborate that answer a little and explain why?
A. It would be dangerous in this preparation because often it is important to get the patient under the influence of quinine promptly.

A preparation that is not palatable would prevent this, in some cases. It seems to me that the answer that it is dangerous answers the question thoroughly.

Direct-examination closed.

No Cross-examination.

Deposition closed.

EDWARD T. HARGRAVE, M. D.

Subscribed and sworn to before me this 21st day of May, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet subject to notice and agreement of counsel.

547 Washington, D. C., June 3, 1915.

Met pursuant to notice and agreement of counsel, at the offices of Chas. E. Riordon, Special Examiner, in the Washington Loan & Trust Building, Washington, D. C.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

FRANK S. HERETH, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Frank S. Hereth; age, 57; Brooklyn, N. Y.; Pharmaceutical Chemist. I am Chief Pharmacist for E. R. Squibb & Son, of New York, N. Y.

Q. 2. Do you know anything about the concern known in the drug trade as the Searle & Hereth Co., and if so, what can you tell us concerning this concern?

By Mr. Rawle: Objected to as irrelevant and immaterial.

A. I know very little of it since June, 1905, when I left the company. Sometime in March, 1905, I resigned my position as president of the Searle & Hereth Company and subsequently sold all of my stock in the company.

Q. 3. Then you are the same Hereth who was formerly a part of The Searle & Hereth Company?

A. Yes, sir.

548 Q. 4. Did you have knowledge of all of the pharmaceuticals and medicinal preparations manufactured by The Searle & Hereth Company?

A. I did.

Q. 5. Did The Searle & Hereth Company prior to the time you left that concern ever manufacture or sell a preparation called "Quin-Coco?"

A. No, sir.

Q. 6. Are you familiar with the pharmaceutical preparation known as "Coco-Quinine," and if so, what can you tell us of this preparation, as to its origin?

A. I know the preparation and handled it frequently while I was in the employ of Eli Lilly & Company, and I have seen the manufacturing formula by which it is made.

Q. 7. Did you ever know of a chocolated syrup quinine preparation prior to the time Coco-Quinine was brought out by Eli Lilly & Company?

A. I do not recollect of ever having heard of any such preparation.

Q. 8. Do you remember while president of The Searle & Hereth Company whether or not this company made any efforts to produce a preparation similar to "Coco-Quinine" or whether or not the matter was considered by said company?

If so, will you please explain what you know about this question?

By Mr. Rawle: Objected to as irrelevant and immaterial and as calling for matter res inter alios acta.

A. No experiments to produce an article similar to it were ever made at my instigation or with my knowledge. I have no recollection of the company ever considering putting out a preparation of this nature. I am sure it was never taken up in an official way.

Q. 9. Was it ever taken up unofficially with you?

Same objection.

549 A. I know that at various times our salesmen asked us if we would not make a preparation similar to "Coco-Quinine" but I never acceded to the request.

By Mr. Rawle: The answer is further objected to as hearsay.

Q. 10. Did you express any reasons for not acceding to such requests at the time, and if so, what were they?

By Mr. Rawle: Object-s repeated.

A. One reason why I declined to consider them was that I thought that Eli Lilly & Company had originated the article and since I regarded them as personal friends I did not care to make a competing product, in the same line.

By Mr. Rawle: The answer is objected to because the state of mind of the witness is not evidence.

Q. 11. Do you mean that The Searle & Hereth Company declined to make any preparations which would compete with preparations manufactured by Eli Lilly & Company?

Same objections and because the question is leading.

A. No, I do not mean this, since we made many preparations that were in a sense competitors, but I regard the form in which this preparation was made as original and felt that we should not make a preparation similar to it in composition and appearance in order that it might be used as a substitute for "Coco-Quinine."

Q. 12. As a pharmaceutical chemist have you considered whether or not the chocolate or cocoa in "Coco-Quinine" is essential to the medicinal or therapeutic value of the medicine, and if so, what is your opinion on this subject?

A. I think the therapeutic value of the medicine resides solely in the quinine sulphate and that it is not modified any by the
550 presence of the chocolate, or cocoa.

Q. 13. Would or would it not be possible to make a preparation which could compete with "Coco-Quinine" as a medicine and flavored with other flavoring syrups than chocolate and of different color than chocolate?

By Mr. Rawle: Objected to as immaterial.

A. I think other preparations might be made to compete with it as far as their ability to disguise the taste of quinine is concerned and at the same time retain the therapeutic efficiency of the quinine.

Q. 14. Do you know when The Searle & Hereth Company was taken over by the Pfeiffer Chemical Company, and if so, please state?

A. I do not know the exact time since I was then residing in Brooklyn, but I think it was some time in May or June of 1906, since it was at that time that I signed over my stock in The Searle & Hereth Company.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

X Q. 15. Do you know of any satisfactory liquid preparation of quinine sulphate now on the market not containing cocoa or chocolate?

A. I regard Quinimel as a very good one.

X Q. 16. Does Quinimel contain quinine sulphate?

A. No, sir, it does not. In that way it would not be a substitute, excepting that it is used as a base for disguising quinine sulphate.

X Q. 17. As you have just stated that Quinimel does not contain quinine sulphate, please answer X Q. 15.

A. I see I misapprehended that first question. I do not know of any at all.

X Q. 18. I understood you to say that The Searle & Hereth Co. had manufactured many preparations which were competitors with corresponding Lilly preparations? Is that correct?
551 A. Yes, sir.

X Q. 19. Could you give me some idea of about how many such there were?

A. There are a good many hundreds which The Searle & Hereth Company made in common with other manufacturers of pharmaceutical preparations which were all competitors with each other. I include Lilly among the other manufacturers. This would perhaps include a full line of fluid extracts, many elixirs, syrups and tablets, for which no proprietorship in same was claimed.

X Q. 20. And wouldn't this list include some specialties as they are called?

A. I think it would.

X Q. 21. How many?

A. It would be impossible for me to say. A score, more or less.

X Q. 22. What do you mean by "specialties" in this connection?

A. Those preparations upon which some special effort was made to introduce them by the house introducing them.

X Q. 23. Could you name one or two preparations which at that time fell within this definition of "specialties," of which you say there was a score?

By Mr. Bradford: Objected to as irrelevant and immaterial and not cross-examination.

A. I might mention Syrup of Yerba Senta Aromatic afterwards called Yerbazin by Eli Lilly & Company. The Searle & Hereth Company made a preparation called "Quinimel" which was used in a similar way and for a similar purpose as Syrup Yerba Senta Aromatic or Yerbazin was used. We also made a Syrup Hypophosphites Compound Hematic which was supposed to be similar to Fellows Syrup of Hypophosphites.

X Q. 24. Is it not true that other drug houses made
552 preparations similar to Searle & Hereth preparations originated by the latter?

Objection repeated.

A. Yes, sir.

X Q. 25. And is the same thing true of Lilly? Did Lilly make preparations similar to preparations originating from Searle & Hereth?

Objection repeated and the further objection is noted that counsel is plainly endeavoring to use witness as his own witness and the question is therefore improper.

A. They made some preparations that were similar to some preparations made by The Searle & Hereth Company and originated by The Searle & Hereth Company, but whether they were exact duplicates of them or not, I do not know. I do not know whether they were offered as substitutes.

X Q. 26. Could they not have been offered as substitutes, being similar, or identical in therapeutical effect?

Objection repeated.

A. They might have been offered as substitutes as far as composition and therapeutical effect was concerned, but I can not at the

present time say whether or not they were the same in physical appearance as to flavor and color, &c.

X Q. 27. I take it that what you mean by a "substitute" is a preparation which could be sold or dispensed on prescription or over the counter in place of a similar article made by another drug house? Is that correct?

Objection repeated.

A. If specified by the physician for that purpose, yes.

X Q. 28. Then, I take it from your testimony that in all these cases of similar preparations put out by different drug houses,
553 substitution by a druggist on prescription specifying a particular drug house as the maker of the prescribed drug would have been possible? Is that correct? I mean to ask whether if a physician wishing to prescribe one of the particular preparations you have referred to as similar, should write in his prescription the name of the maker, could not the druggist fill this prescription by the same drug, but made by a different house? And would this come within your definition of "substitution"?

Objection repeated.

A. A druggist would not be justified in dispensing A's preparation if a physician's prescription called for B's. If he did I would call it "substitution."

X Q. 29. I take it that you mean that the druggist could fill such prescription with the drug of a house other than the one specified. Is that correct? By "could," I mean would it be possible?

Objection repeated, and the court's attention is asked to the flagrant abuse by counsel for defendant of the privilege of cross-examination, in taking plaintiff's time and wasting plaintiff's money in seeking to take a deposition on behalf of defendant to sustain defendant's theories of defense.

By Mr. Rawle: Defendant's counsel means to keep and believes that he has kept clearly within proper cross-examination. The witness has stated under objection that Searle & Hereth were unwilling, while he was a member thereof, to manufacture a chocolated quinine preparation because it would compete with Lilly's "Coco-Quinine." Defendant's counsel seeks to develop the fact that at that very time Searle & Hereth were manufacturing large numbers of preparations and a score of specialties which did compete in the same way with preparations of other drug houses, including Lilly. Counsel
554 regrets to take the time of the court in obvious explanations.

By Mr. Bradford: Counsel for plaintiff repeats his objection and repeats his request that the court take judicial notice of the line of examination being indulged in by counsel for defendant and contends that there is absolutely no basis in the direct-examination for this line of cross-examination.

A. It would be physically possible.

X Q. 30. When you say that it would be "physically possible," I understand you to have in your mind the entire class of preparations

including the specialties which are at any time manufactured by more than one drug house and which are similar preparations pharmaceutically?

Objection repeated.

By saying it would be "physically possible" I mean that it would be possible in the same manner that a druggist might dispense cinchonidine sulphate when quinine sulphate is specified on the prescription.

By Mr. Rawle: The answer is objected to as irresponsive.

X Q. 31. X Q. 30 repeated.

Objection repeated.

A. Yes, it is "physically possible" to. I mean that a druggist can dispense anything he wishes to dispense as a substitute for anything else, but I say nothing as to his justification for so doing.

X Q. 32. In X Q. 19 you said that there were a good many hundreds of preparations which The Searle & Hereth Company made in common with other manufacturers of pharmaceutical preparations which were all competitors with each other, and you included Lilly among the other manufacturers.

555 By "competitors" in this answer I infer that you mean preparations of like therapeutical effect. Is that correct?

Same objection.

A. I mean preparations of like therapeutical effect and identical composition.

X Q. 33. I now ask you whether a druggist filling a prescription specifying one of such preparations and giving the name of the house that made it, could not fill such prescription with the like drug of another house without the doctor or the customer discovering it?

Same objection.

A. He could do it but he shouldn't. It might not always be possible to discover it.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 34. You have referred to Yerbazin, Lilly, and Quinimel S. & H. As to these two products is Quinimel used or can it be used as a substitute for Yerbazin, using the term "substitute" in the trade sense?

A. No, because it is not the same color.

Deposition closed.

FRANK S. HERETH.

Subscribed and sworn to before me this 3rd day of June, 1915.
CHARLES E. RIORDON,
Special Examiner.

ROBERT J. GROVES, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

556 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. Robert J. Groves; age, 40; Philadelphia, Pa.; Travelling Salesman for Eli Lilly & Company, of Indianapolis, Indiana. I cover Southeastern Pennsylvania.

Q. 2. How long have you been employed by Eli Lilly & Co.?

A. Four years and three months.

Q. 3. Where were you employed prior to your employment by Eli Lilly & Co.?

A. William R. Warner & Co., of Philadelphia, Pa.

Q. 4. What were your duties while you were employed by William R. Warner & Co., and how long were you in their employ?

A. I was with them five years and two months. The first three years I was employed in the laboratory as general helper. For the last two years of my employment with them I was a travelling salesman.

Q. 5. I show you a document marked "Complainant's Exhibit, R. J. Groves Copy of Document No. 3," and ask you if you have ever seen this document before, and what it is?

A. It is a comparative sheet showing the goods manufactured by William R. Warner & Co., which could be sold against goods manufactured by other pharmaceutical houses. Yes, I have seen this sheet before.

Q. 6. When and under what circumstances did you see it before?

A. The sheet was given to me by Mr. H. Pfeiffer, when I started on the road to sell for him.

Q. 7. For what purpose was this sheet used by you?

A. It enabled me to sell goods of our manufacture against the goods manufactured by other houses at a much cheaper price.

Q. 8. How did it enable you to do this?

557 A. The prices quoted in this comparative sheet were considerably cheaper than the prices quoted by our competitors.

Q. 9. Referring to the item "Coco-Quinine" do you find this on the sheet in question and if you do what information does that sheet give you relative to this item?

A. Yes, "Coco-Quinine" is found on page 2. We had a similar product under the name of "Quin-Coco" put up in pints, five pints and gallons. The product manufactured by William R. Warner & Co. was sold in gallons at $3.75 per gallon, whereas Eli Lilly & Company's product was for five pints $3.30, which netted the druggist a considerable profit over the price paid Eli Lilly & Company.

Q. 10. What do you mean by netted the druggist considerable profit. What netted the druggist considerable profit?

A. "Quin-Coco" netted the druggist considerable profit over "Coco-Quinine."

Q. 11. What were your methods in offering "Quin-Coco" to the druggists?

By Mr. Rawle: Objected to because the only "method" that is relevant and material is the method authorized by his employer.

A. I sold "Quin-Coco" as a substitute for "Coco-Quinine," as identical in appearance, containing the same amount of quinine; and said it could be sold on prescription as "Coco-Quinine."

By Mr. Rawle: The answer is further objected to because the witness states inferences and not facts.

Q. 12. Will you state in substance, as near as you can remember, what you would say to the druggist when you solicited his order for "Quin-Coco," using the language exactly as you would if talking to the druggist.

358 By Mr. Rawle: Same objection as to the last question.

A. On calling on the druggist if I found that he was a user of "Coco-Quinine," I used my best efforts to sell him "Quin-Coco," pointing out to him that the product was equally as good as Coco-Quinine and cost him less money and could be dispensed on prescriptions and sold over the counter as "Coco-Quinine."

Q. 13. On whose authority did you make such statements and representations to the druggists?

By Mr. Rawle: The question is objected to because the only proper question is as to what instructions were given to the witness by his employer. The witness has not stated that he had any authority.

A. On the authority of William R. Warner & Co.

Q. 14. By whom were you given the instructions or authority in this matter?

A. I am not sure whether it was Mr. Hagaman or Mr. H. Pfeiffer.

Q. 15. What did either of these gentlemen say to you on this subject?

A. So far as their words are concerned, I have no recollection, but I was to push "Quin-Coco" as well as other goods of our manufacture against the goods of our competitors.

Q 16. What did either of them say to you if anything as near as you can recall, in regard to "Quin-Coco"?

A. That "Quin-Coco" was an exact duplicate of "Coco-Quinine."

Q. 17. Did either of them tell you that "Quin-Coco" could be used and sold by the druggist as a substitute for "Coco-Quinine"?

By Mr. Rawle: Same objections and as leading.

359 A. Whether they told me or not I always understood and sold it as a substitute for "Coco-Quinine."

By Mr. Rawle: Objected to as to what the witness understood except as told, is not evidence.

Q. 18. During what years were you employed in the laboratory of William R. Warner & Co.?

A. From December, 1905, to January, 1909.

Q. 19. During that period was the product called "Quin-Coco" manufactured in the laboratory of William R. Warner & Co.?

A. It was in the latter part of 1908 the firm of William R. Warner & Company was taken over by the Pfeiffer Chemical Company, and "Quin-Coco" was not made in the laboratory of William R. Warner & Co. until the last month of 1908, it being supplied from the laboratories in St. Louis.

Q. 20. Was "Quin-Coco" manufactured by William R. Warner & Co. during the latter part of 1908?

A. During the latter part of 1908 they were experimenting on "Quin-Coco" in the laboratory as they had not got the working formulas from St. Louis on "Quin-Coco," and were unable to make a satisfactory product.

I do not recollect whether it was made during the latter part of 1908 or not. During the latter part of 1908 they were experimenting.

Q. 21. You spoke of the working formula for "Quin-Coco" being received from the laboratory in St. Louis. Were you in the Warner laboratory when this working formula was received?

A. I do not recollect whether the working formula was received during my time in the laboratory or not.

Q. 22. Do you know whether or not any "Quin-Coco" was ever made in the laboratories of William R. Warner & Co., in Philadelphia?

A. Yes, there was "Quin-Coco" made in the laboratories of
560 William R. Warner & Co. during the latter part of 1908, but whether it was marketed or not, I do not know.

Q. 23. Did you understand that my previous questions asked as to whether it was marketed or not?

A. No.

Q. 24. I understood you to answer one of the other questions that you do not recollect whether "Quin-Coco" was made in the laboratories of William R. Warner & Co. in the latter part of 1908 or not, and now you say that it was made but you don't know whether it was marketed or not. Please explain?

A. It was made in an experimental state, but whether they got the product perfected for market or not during the latter part of 1908 I do not know.

Q. 25. Please tell what you know about the experimental work on this product in the latter part of 1908 in the laboratories of William R. Warner & Co.?

By Mr. Rawle: Objected to as immaterial.

A. In the latter part of 1908 the superintendent in charge of the wet room department was experimenting on "Quin-Coco" to get it as near the product manufactured by Eli Lilly & Company as pos-

sible. He made several samples but none of them came up to the consistency or color of the product manufactured by Eli Lilly & Co., and it was not until the formula came from St. Louis that they found the chocolate they were using in Philadelphia was different from what they were using in St. Louis.

Q. 26. How do you know that the experiments referred to were not the same in color and consistency as the Lilly product "Coco-Quinine"?

Same objection.

A. Because we had samples of "Coco-Quinine" manufactured by Eli Lilly & Co. before us.

Q. 27. Were the results of the Warner experiments compared with the Lilly product as the experiments progressed?

Same objection.

561 A. Yes.

Q. 28. Were the efforts in the Warner laboratory directed to reproducing the identical color and consistency of the Lilly product?

Same objection.

A. I do not know what instructions were received by the superintendent, but I do know that he did his utmost to make a product similar in color to that of the Lilly product.

Q. 29. Were his experiments considered successful and if not what was the objection to the product he made?

Same objection.

A. His efforts were not a success. So far as I can remember the color was not right.

Q. 30. Did you personally have anything to do with these experiments in the way of assisting the superintendent or consulting with him on the subject?

A. No, nothing to do with the experiments, but when he was doing his experimental work he generally took me into consultation and asked me what I thought of the product, before submitting it to the General Manager.

Q. 31. Do you recall anything that the superintendent said to you on the subject at any of these consultations and if so please state what he said, if you can recall?

Same objection.

A. The only thing I remember the superintendent to say was when the formulas came from St. Louis he found that the chocolate was different from what he was using in Philadelphia.

Q. 32. What difference would this make in the product?

Same objection.

A. So far as I can remember it brought it to the required color.

562 Q. 33. How was this required color shown?

Same objection.

A. It made it the same color of the product we were trying to duplicate, Lilly's Coco-Quinine.

Q. 34. You have referred to the General Manager. Who was the General Manager?

A. Mr. G. A. Pfeiffer.

Q. 35. The same G. A. Pfeiffer who is present in the room today?

A. Yes, sir.

Q. 36. What was the usual way for the Warner salesman to refer to the Document No. 3, which you have before had called to your attention?

By Mr. Rawle: Objected to unless authority is shown; because the question calls for hearsay; because the question calls for acts of a large number of Warner salesmen as to which the witness can not possibly have any knowledge and any answer he may give will be guess work.

A. Comparative List. That was the title I always knew it by.

Q. 37. Did you ever make any sales of "Quin-Coco" to druggists on such representations as you have previously stated it was your custom to make druggists?

By Mr. Rawle: Some objection as to want of authority and as calling for a general statement instead of for facts.

A. Yes.

Q. 38. What connection did Mr. H. Pfeiffer have with the Warner Company, if you know?

A. When I was employed by William R. Warner & Co. Mr. H. Pfeiffer was then vice president and the general sales manager.

Q. 39. What connection did *the* Mr. Hagaman have with the William R. Warner & Co.?

563 A. We looked upon him on the road as assistant sales manager.

Q. 40. During the period you were on the road for William R. Warner & Co. did you have more than one of the documents Exhibit Document No. 3, and if so, how many and by whom were they furnished to you?

A. I remember having three. They were furnished by Mr. H. Pfeiffer.

Q. 41. Were they furnished all at one time or at different times?

A. They were furnished at different times.

Q. 42. What would be the reason of giving you a new list when it was given to you?

A. I remember the second list was given me because I lost the first, and the third I think was a new edition.

Direct examination closed.

Cross-examination, without waiving objections.

By Mr. Rawle:

By Mr. Rawle: I give notice of a motion to strike out the testimony of this witness as to his methods of selling, no admissible and valid evidence having been given of authority.

By Mr. Rawle:

X Q. 43. Did you act as a chemist in the Warner laboratory?

A. No.

X Q. 44. What did you do?

A. I had no particular duty in the laboratory. I was employed in the wet room department. I had to do whatever the superintendent instructed me to do.

X Q. 45. Who was the superintendent?

A. Mr. Harry Fritsch.

X Q. 46. I infer that you were a sort of utility man. Is that correct?

A. No.

564 X Q. 47. What did you do?

A. I was employed in the laboratory to do whatever the superintendent instructed me to do.

X Q. 48. What did you do?

A. I assisted in making fluid extracts, syrups, and elixirs.

X Q. 49. Did you assist the chemist in these "Quin-Coco" experiments personally?

A. I was the only one employed in the laboratory at the time whom he could ask as to the product.

X Q. 50. I understood you to say that he did not consult you as to "Quin-Coco." Is that correct?

A. No.

X Q. 51. You mean he did not?

A. Yes, he did consult me in regards to "Quin-Coco."

X Q. 52. Did he use chocolate?

A. He used a product which appeared to me as chocolate.

X Q. 53. Do you know whether he did or did not use chocolate?

A. It depends upon what definition you put on chocolate and cocoa. It was either one or the other.

X Q. 54. How long did these experiments last before the St. Louis formula came?

A. It might have lasted ten days and it might have lasted three weeks.

X Q. 55. Which do you swear to?

By Mr. Bradford: Objected to as improper.

A. I swear to neither.

X Q. 56. Who first suggested your becoming a travelling salesman for Warner & Co.?

By Mr. Bradford: Objected to as irrelevant, immaterial and not cross-examination.

A. I first made application to Mr. G. A. Pfeiffer about the month of October, 1908, who informed me that Mr. H. Pfeiffer was
565 away from home and would not be back until about November or later. On Mr. H. Pfeiffer's return I believe Mr. G. A. Pfeiffer spoke to him about me having made application to him for the position then rendered vacant by Mr. Joseph Barbiere leaving the firm of William R. Warner & Co. Mr. H. Pfeiffer sent to the laboratory for me and I was engaged to start the first January in the following year. He sent for me about the beginning of December.

X Q. 57. Between your appointment and January 1st, how often did you talk with Mr. H. Pfeiffer about selling methods?

A. I have no recollection how often.

X Q. 58. Was it more than once?

A. It might have been twice or three times.

X Q. 59. Do you swear that it was more than once?

A. No.

X Q. 60. How long did the interview last?

A. I have no idea how long it lasted.

X Q. 61. Do you swear it was more than ten minutes?

A. I can not swear to any length of time.

X Q. 62. Can you state the words which he used on the subject of selling methods?

A. No, I can not.

X Q. 63. During that month of December how many talks with Hagaman did you have on selling methods?

A. None.

X Q. 64. I hand you a small book on the first page of which appear the words "Salesman's Confidential and Manual." Did you receive from the company at or about the time you went on the road a manual substantially like this?

A. Yes, but the one at that time was entirely different from this one.

X Q. 65. The manual I have just handed you is marked 1913-1914, and the period you are referring to is 1909. Does the difference consist in the difference in the list of articles contained in the manual you hold in your hand and the one you received in 1909?

566 By Mr. Bradford: Objected to as incompetent, immaterial and irrelevant. The books will show for themselves and are the only competent evidence on this point.

A. Yes, and in the number of articles listed in this book. The instructions contained in this book from page 78 to page 87 were not included in the book I received in 1909. The book that I received in 1909 was simply called "Salesman's Confidential," the word "Manual" was not on it.

By Mr. Rawle: The book shown the witness is marked by the Special Examiner for purposes of identification as "Book Shown Witness Grove June 3, 1915."

X Q. 66. What became of the book you received in January, 1909?

A. It was returned to William R. Warner & Co.

X Q. 67. Did not the book you received in 1909 have any instructions to salesmen?

A. Yes, but only regarding confidential prices.

X Q. 68. Did it not have any instructions as to how to make out orders or as to credit and collection policy?

A. No.

X Q. 69. At the time you had the talk with Mr. H. Pfeiffer, did you receive the "Salesman's Confidential" and the blue list which you call comparative list, marked "Document No. 3?"

A. No, not until the day before I started out to work.

X Q. 70. I understand that you are doubtful as to whether William R. Warner had made any "Quin-Coco" and put it on the market prior to January 1, 1909?

A. That is correct.

X Q. 71. If that is correct then the first comparative list which you received just before you went on the road did not contain the item "Quin-Coco," did it?

A. Yes, "Quin-Coco" was sold by William R. Warner & Co. prior to January, 1909, it being shipped from the laboratories in
567 St. Louis under the name of Searle & Hereth, and distributed by William R. Warner & Co.

X Q. 72. You have said that you received three comparative lists during your selling period with Warner & Co. Is the one which you have had in your hand this morning "Complainant's Exhibit, Document No. 3," the first, second or third of the three?

A. It is either the second or the third.

X Q. 73. Do you swear that the first one of the three was given you by the company before you became its salesman?

A. No.

X Q. 74. When was it given to you?

A. The evening I received my samples and confidential list, and general price list.

X Q. 75. When was that relative to January 1st, 1909?

A. About a day or two days before.

X Q. 76. How many items or different articles in the Warner line did you start out to sell January, 1909?

A. Every item that it was possible to sell manufactured by William R. Warner & Co. and the Pfeiffer Chemical Company, and goods listed in the Searle & Hereth catalogue, having the three lists with me. It may have been ten thousand or it may have been thirty thousand items, I could not tell.

X Q. 77. Do you swear that out of these ten or thirty thousand items you were to sell Mr. Henry Pfeiffer picked out "Quin-Coco" which the company had just begun to sell and gave you special instructions as to how to sell "Quin-Coco?"

A. I do not.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 78. Did you have any interviews with Mr. H. Pfeiffer or Mr. Hagaman after you started out on the road for William R. Warner & Co.?

568 By Mr. Rawle: Objected to as not proper redirect-examination.

A. Yes, I went with Mr. Hagaman after being out one week in the City of Philadelphia. After working one week in the City of Philadelphia and vicinity I went out on the road with Mr. Hagaman for instructions, working West Chester, Downingtown, Bethlehem, South Bethlehem, Sellersville, Souderton and Lansdale, Pennsylvania.

R. D. Q. 79. On this trip did you and Mr. Hagaman sell any "Quin-Coco?"

Same objection.

A. Not as far as I can recollect.

R. D. Q. 80. Do you remember whether you offered it to the druggists?

Same objection.

A. I don't remember whether we offered it or not.

R. D. Q. 81. Do you remember of Mr. Hagaman telling you anything about this preparation?

A. That was the first time that I got thoroughly familiar with the comparative list as we went through every item on it he pointing out to me some of the best sellers. Whether "Quin-Coco" was one of them or not I can not say, as there was no demand in this territory for quinine preparations of any kind.

R. D. Q. 82. Do you remember whether Mr. Hagaman at any other time spoke to you about "Quin-Coco?"

Same objection.

A. Yes.

R. D. Q. 83. When was this and what did he say?

A. At that time he was working as a salesman, Bristol being one of the towns where there was a great deal of malaria and where he had placed quite a little "Quin-Coco." He told me that Bristol was one of the towns where he could sell "Quin-Coco," and on one
569 trip to Bristol myself I found quite a number of the druggists using "Quin-Coco."

R. D. Q. 84. Did Mr. Hagaman tell you what statements he made to the druggists to induce them to buy "Quin-Coco"? Or instruct you what statements you could make in selling this product?

By Mr. Rawle: Same objection as to the question and as to the first clause objected to as secondary evidence, and as to the second

clause because it does not appear that Hagaman had any authority to instruct the witness.

A. Yes, he told me that by pushing "Quin-Coco" we were pushing as good an article as "Coco-Quinine", Lilly, the therapeutic action being the same and containing the same amount of quinine, and on subsequent trips with me after he was made assistant sales manager we pushed "Quin-Coco" along with other things.

R. D. Q. 85. How did you and Mr. Hagaman push "Quin-Coco"? What did you tell the druggists?

Objected to because not cross-examination and further objected to unless authority for the method is shown.

By Mr. Bradford: Attention is called to X Q. 63.

A. We sold "Quin-Coco" as a substitute for "Coco-Quinine," telling the druggists that it was a similar product to "Coco-Quinine" in appearance and taste, containing the same amount of quinine as "Coco-Quinine," and much cheaper in price, one gallon costing $3.75 and "Coco-Quinine" would cost them in five pints $3.30.

R. D. Q. 86. In your previous testimony you have stated that you told the druggists also that they could furnish "Quin-Coco" on calls for "Coco-Quinine." Did you and Mr. Hagaman make such representations to the druggists on the trips referred to in your last answer?

570 By Mr. Rawle: Objected to as not cross-examination and as leading and entirely improper.

A. In that territory there was very little "Coco-Quinine" sold, so we did not push "Quin-Coco."

R. D. Q. 87. My question relates to the statements you have made relative to the sales of "Quin-Coco" in Bristol. Did you tell the druggists in Bristol that they could use "Quin-Coco" for "Coco-Quinine?"

Same objection.

A. Yes.

R. D. Q. 88. Who gave you the Salesman's Confidential and the comparative list, your samples and your catalogue before you began working as a salesman for Warner & Company?

A. Mr. H. Pfeiffer.

Re-direct-examination closed.

Recross-examination, without waiving objections.

By Mr. Rawle:

R. X Q. 89. Did Hagaman work Bristol with you at that time?

A. No.

R. X Q. 90. Can you name the druggists in Bristol you solicited?

A. No.

R. X Q. 91. How long did Hagaman travel with you?

A. At intervals of about three weeks in a period of two years. I mean that I travelled with Hagaman altogether about three weeks at different intervals during two years' service.

R. R Q. 92. On your first trip with Hagaman did you go to Bristol?

A. No.

R. X Q. 93. Will you swear that you ever heard Hagaman say to a druggist that he could buy "Quin-Coco" and substitute it on calls for "Coco-Quinine?"

571 A. I have heard him tell druggists that "Quin-Coco" could be sold as "Coco-Quinine," but where I cannot say.

R. X Q. 94. Can you swear that you ever heard Hagaman advise a druggist to buy "Quin-Coco" and substitute it on calls for "Coco-Quinine?"

A. Yes.

R. X Q. 95. What did he say to them?

A. That "Quin-Coco" was a similar product to "Coco-Quinine" containing the same amount of quinine and was like it in appearance.

R. X Q. 96. That is what he said, is it?

A. That is what we all said. That was our only method of selling it.

R. X Q. 97. And that is what Hagaman said?

A. He could say nothing else.

R. X Q. 98. And that is what you used to say?

A. Yes, it being the only selling point we had.

Deposition closed.

ROBERT J. GROVES.

Subscribed and sworn to before me this 3rd day of June, 1915.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet at Hotel Piedmont, Atlanta, Georgia, Saturday, June 5th, 1915, at 10 a. m.

By Mr. Rawle: Mr. Rawle states that testimony has already been taken from Saginaw, Michigan, to Houston, Texas, and east to Mobile, &c., and at Atlanta, Georgia, during a period of twenty-eight days and objects to another excursion to the South for the same purpose.

By Mr. Bradford: Counsel for plaintiff regrets the necessity of taking counsel for defendant back to Atlanta, but desires to

572 place on record these facts: The witness to be examined on Saturday, June 5th, was not available when the other depositions were taken in Atlanta and counsel was unable at that time to get any definite information as to when the witness would be available, the witness being a traveling salesman and away from home at the time. Of all these facts counsel for defendant was at the time advised and the promise made that if the witness could be persuaded

to come to Washington or some other near point, this course would be pursued. Counsel for plaintiff and plaintiff's agent has made every effort possible to persuade the witness to come to Washington at this time to give his deposition, but the witness has declined and it is for this reason that it becomes necessary to return to Atlanta greatly to the regret and inconvenience of counsel for plaintiff as well as counsel for defendant.

Atlanta, Georgia, June 5, 1915.

Met pursuant to adjournment, at the Piedmont Hotel, Saturday, June 5, 1915.

Present:

Mr. E. W. Bradford, on behalf of plaintiff; and
Mr. Francis Rawle, on behalf of defendant.

LEMUEL B. HARDY, a witness called by and on behalf of the plaintiff having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

573 A. Lemuel B. Hardy; age, 52; Atlanta, Georgia; Travelling Salesman for Atlas Oil Company.

Q. 2. How long have you been in your present employment and where were you employed prior thereto?

A. I have been travelling for them for about eighteen months, but have been exclusively in their employment for about three months. During the other period I travelled for them part of the time and ran a retail drug store in Atlanta, in connection with my son at the same time. Prior to that time I was a travelling salesman for Wm. R. Warner & Co., having been with that concern and the Pfeiffer Chemical Company for about six years.

Q. 3. While you were a travelling salesman for Wm. R. Warner & Co., did you among other goods sell a preparation called "Quin-Coco"?

A. I did.

Q. 4. When did you begin selling "Quin-Coco", if you remember?

A. I don't remember exactly but I think it was about 1908. During the first part of my employment I was in the northern Georgia territory where there is not a very great demand for quinine preparations and consequently did not push this particular product very hard, but after I went into South Carolina, in 1910 or 1911 and 1912, there being a greater demand for "Coco-Quinine" I then began to work harder and push "Quin-Coco", and pushed it strictly as a substitute for "Coco-Quinine".

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Q. 5. Please state what representations or statements you made to the druggists when you solicited their orders for "Quin-Coco", as near as you can remember?

A. I stated to the druggists that it was the same thing in color and contents as "Coco-Quinine", with the exception that it flowed a little more freely, and that they could use it as a substitute for "Coco-Quinine" from the fact that it contained both quinine and
574 cocoa, and the advantage they had in buying "Quin-Coco" was the cheapness in price, cheaper than "Coco-Quinine". I demonstrated to them also that it was the same color and I have had them taste of it to see that it was the same taste.

By Mr. Rawle: The answer is objected to unless proof of authority is given to make such statements.

Q. 6. On whose authority did you make such statements when soliciting orders for "Quin-Coco" from the retail druggists?

By Mr. Rawle: Objected to because the question is not on whose authority it was but who gave him authority.

A. Well, I got authority from Mr. McNulty at one time I remember and I am sure Mr. H. Pfeiffer instructed me on that too.

Q. 7. When did Mr. McNulty instruct you and state what Mr. McNulty said to you, if you remember?

A. In the latter part of 1911 or in the early part of 1912 Mr. McNulty told me that I could say to the druggists that they would have a right to sell it on doctor's prescriptions for "Coco-Quinine", as both contained quinine and cocoa.

Q. 8. Did Mr. McNulty make this statement to you more than once?

A. It was discussed several different times while he was with me; I don't remember how many different times.

Q. 9. Who is Mr. McNulty to whom you have referred and what connection has Mr. McNulty with Wm. R. Warner & Co.?

A. My understanding from Mr. McNulty he was one of the head officials and it was his business to go to see the salesmen and give them all the points and get all the points he could in assisting the salesman to sell their products.

575 Q. 10. Did you understand that his instructions were the instructions of Wm. R. Warner & Co.?

A. I did.

Q. 11. Please explain how you proceeded to demonstrate to the retail druggists the similarity in color between the product "Quin-Coco" and the product "Coco-Quinine"?

A. I would do so by pouring the two on a piece of paper to show the same color, sometimes by letting it drain out of the bottle to show that they were the same color.

Q. 12. Would you have a bottle of each preparation at the time in order to compare the two, one with the other? I mean would you have a bottle of each when you were making these comparisons?

A. I would get the druggist's bottle of "Coco-Quinine" and compare it with the bottle of "Quin-Coco" that I had with me.

Q. 13. What was the point from the selling standpoint in showing the druggists that the two products were of the same color and taste?

By Mr. Rawle: Objected to as immaterial, the facts speak for themselves, the reason is not evidence.

A. The question was to show them that it was the same piece of goods and that they could sell it in place of "Coco-Quinine".

Q. 14. Why couldn't they sell it in the place of "Coco-Quinine" if it had been of a different color and of a different taste?

Objected to as immaterial.

A. "Quin-Coco" was not advertised. The doctors did not know it. The consequence was they wrote no prescriptions for "Quin-Coco" and it was to be sold as a substitute for "Coco-Quinine".

Q. 15. Did you ever succeed in selling any of the retail duuggists in your territory the product called "Quin-Coco" on such
576 representations as you have stated you made to them when soliciting orders for this product?

A. Yes, I sold quite a lot of it.

Q. 16. I believe you stated that you have also been in the retail drug business. Have you handled the product called "Quin-Coco" while in the retail drug business?

A. I did.

Q. 17. How did you dispense it?

By Mr. Rawle: Objected to as irrelevant and because the acts of the druggist can not affect the rights of the defendant.

A. I sold it as "Coco-Quinine" and sold it to the same party more than one time.

Q. 18. How did you label it?

Same objection.

A. I label it "Coco-Quinine".

Direct-examination closed.

Cross-examinations, without waiving objections.

By Mr. Rawle:

X Q. 19. Where was Mr. McNulty when he talked to you?

A. We were in South Carolina.

X Q. 20. How many items were you selling of the Warner line?

A. They were selling an immense line. I was selling all of their line. I can't state accurately.

X Q. 21. Were there as many as a thousand items?

A. I couldn't say.

X Q. 22. Were there as many as fifty items?

A. Five or more items.

X Q. 23. Do you mean five or more items in the Warner line?

A. Yes.

577 X Q. 24. Were there more than twenty-five?

A. Five or more items.

X Q. 25. Were there more than fifty?

A. I couldn't say just how many I sold. It is impossible for me to do so.

X Q. 26. I am not asking you how many you sold, but about how many items there were in the Warner line which you could sell if there was a call for them?

By Mr. Bradford: The question is objected to as improper, the witness having stated that he represented their entire line, which was an immense line and if counsel wants the accurate number of items he can obtain it from defendant's catalogues which are the only best evidence on this point.

A. I never investigated the number at all. I tried to sell everything in their entire line.

X Q. 27. How many items were there, as you now remember in the entire line?

A. I can't remember. It is an immense catalogue.

X Q. 28. Were there a hundred?

Question is objected to as improper and also as immaterial and irrelevant.

A. I have answered the question to the best of my knowledge.

X Q. 29. Were there as many as two hundred?

Objection repeated.

A. I have answered to the best of my knowledge.

X Q. 30. Were there as many as five hundred?

Objection repeated.

A. I have answered to the best of my knowledge.

X Q. 31. Will you be good enough to answer it over again?

A. I don't know.

X Q. 32. Where was Mr. McNulty when he talked to you as you have stated?

578 A. In South Carolina. We were in Spartanburg at one time.

X Q. 33. How long was your talk with McNulty after you began to sell for the Warner house?

A. I suppose it must have been about a year, after I went back with them a second time. I went back with them the second time in 1910 or 1911.

X Q. 34. And how long after you went back with them the second time, did you have your talk with McNulty?

A. It must have been about a year; it may not have been so long.

X Q. 35. And that talk was at Spartanburg?

A. It was discussed at Spartanburg and other towns in South Carolina.

X Q. 36. How long was he with you?

A. He was with me on two occasions. I don't remember the exact number of days.

X Q. 37. Did you talk over any other items in the Warner line except "Quin-Coco"?

A. Yes; we talked over the general line.

X Q. 38. A good many of the items in the general line?

A. A good many of them, yes.

X Q. 39. As a Warner salesman, did you have any printed manual or book to aid you?

A. I had their catalogue.

X Q. 40. Did you have a manual called sometimes Salesman's Confidential?

A. Yes, sir; I did.

X Q. 41. Did you turn it in when you left their employ?

A. I guess I did. I turned in everything I had to them.

X Q. 42. Did McNulty give you that or had you had it before?

A. I had it before.

X Q. 43. Were there in it any suggestions to salesmen as to how to conduct the business?

579 By Mr. Bradford: Objected to as incompetent and irrelevant.

A. As well as I remember about the Manual it was a list of items with the lowest prices.

X Q. 44. Don't you remember whether it contained any instructions and suggestions to salesmen?

A. No, sir; I do not.

X Q. 45. Were any of the other Warner items, articles that were in competition with the products of other drug houses?

Objected to as immaterial and irrelevant.

A. There were.

X Q. 46. Were there a good many of them?

Same objection.

A. Yes.

X Q. 47. Did you solicit sales to druggists of such?

Same objection.

A. I did.

X Q. 48. And make sales?

Same objection.

A. I did.

X Q. 49. Could you give me any idea of about how many such there were?

Same objection.

A. I can not. About one or a dozen.

X Q. 50. Do you remember any of them?

Same objection.

A. Pills.

X Q. 51. Can you name any one or more Warner items which you were selling in competition with similar items of other drug houses, giving the regular name used by Warner and the other drug houses?

Same objection.

580 A. Yes; I sold one pill as Aloin Strychnine, Bella-Dona and Epicac, in connection to Lapactic Pills made by Sharpe & Doehme.

X Q. 52. Did you sell that Warner pill to be used as a substitute for that Sharpe & Doehme pill?

Same objection.

A. I did.

X Q. 53. Please name some other Warner item you sold which was similar to a preparation of another house?

Same objection.

A. I couldn't remember any other. I take it you mean specialties.

X Q. 54. Can you name any items of the general pharmaceutical line of Warner which you were selling in competition with a like item of some other house?

Mr. Bradford: Same objection and the further objection is made that this line of examination is not cross-examination and is an unwarranted waste of plaintiff's time and money by defendant in attempting to make the witness his own.

A. Their general line was in competition with other pharmaceutical houses.

X Q. 55. And a druggist who bought such Warner items could use them in substitution for items of the other house?

Same objection.

A. He could.

By Mr. Rawle: Mr. Rawle places of record a protest against these expensive trips into the same territory for taking evidence and states that the notice for this trip included possible depositions in places in North and South Carolina.

581 By Mr. Bradford: Counsel for plaintiff replies that he did advise counsel for defendant that he would investigate some reports as to evidence that might be obtained at Charlotte, N. C., and other towns in adjoining territory, and that he might wish to stop on the return trip from Atlanta to take such depositions, should it develop that in his judgment they would be of sufficient

value. That he stopped at Charlotte on his trip to Atlanta for the purpose of making the investigation in order to save possible inconvenience to counsel for defendant, and that, so far, his investigation shows the evidence that can be obtained there would only be cumulative to the evidence obtained in Virginia and other places and for this reason he has advised counsel for defendant that the possible stop at Charlotte on the return trip has been abandoned and that he may proceed directly to wherever may suit his own convenience. In order that there may be no misunderstanding counsel for defendant is here advised that plaintiff has not yet concluded taking testimony in support of its bill of complaint and that other and equally as expensive trips may yet be necessary, although it is hoped that plaintiff's prima facie case is substantially completed, with this witness' deposition.

By Mr. Rawle: Mr. Rawle asks the court to draw no inference from the words of plaintiff's counsel as to "cumulative" evidence.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 56. I hand you "Complainant's Exhibit, Document No. 3," and ask you if when you were a salesman for Warner & Co., you had a similar document and if so by whom it was given to you?

A. I had one of the same, similar to this. It was sent
582 to me by Wm. R. Warner & Co. and the Pfeiffer Chemical Co.

Deposition closed.

L. B. HARDY.

Subscribed and sworn to before me this 5th day of June, 1915.

CHARLES E. RIORDON,
Special Examiner.

Counsel for both parties agree that Dr. Frank L. Eskridge, if called as a witness for plaintiff, would testify as follows:

My name is Frank L. Eskridge; my age is 30 years; I am a resident of Atlanta, Georgia, and have been a practicing physician for eight years; I have used Coco-Quinine in my practice during the past seven years; I regard Coco-Quinine as a medicinal preparation of merit and prescribe it frequently; I write my prescriptions usually just "Coco-Quinine" and this designation is intended to specify the product of Eli Lilly & Company, being the only product, in my judgment, answering such specifications.

CHARLES E. RIORDON,
Special Examiner.

Adjourned to meet subject to notice and agreement.

583 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY & COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

CITY OF WASHINGTON,
District of Columbia, ss:

I, Charles E. Riordon, a Notary Public, within and for the District of Columbia, duly appointed Special Examiner by order of Court, of record in this cause, do hereby certify that the foregoing depositions of witnesses on behalf of the plaintiff, in the above entitled cause, were taken before me pursuant to notice and agreement as follows:

At Richmond, Va., May 20, 1915:

J. L. Ridenour, Sr.,
G. W. Burton,
E. C. Fisher,
William S. Cavedo.

At Emporia, Va., May 20, 1915:

Albert B. Garber,
Walter S. Lindsay,
Le Grand E. Wetzel.

At Norfolk, Va., May 21, 1915:

Edgar B. Allen,
F. D. Nelligar,
Harry T. Hargrave.

584 At Washington, D. C., June 3, 1915:

Frank S. Hereth,
Robert J. Groves.

At Atlanta, Ga., June 5, 1915:

Lemuel B. Hardy.

That each of said witnesses was by me first duly sworn in accordance with law, before the commencement of his testimony; that the testimony of said witnesses was reduced to writing by myself upon

a typewriting machine from the dictation of said witnesses; that the examination of said witnesses was conducted by Mr. E. W. Bradford, attorney for plaintiff, and by Mr. Francis Rawle, attorney for defendant, as appears in the record; that the deposition of each of said witnesses was read over by or to him and signed by him in my presence; that I am not of counsel or attorney or connected by blood or marriage with either party to this cause and that I am not interested directly or indirectly in the matter in controversy or in the result of this suit.

In testimony whereof I have hereunto set my hand and seal this 16th day of June, 1915.

CHARLES E. RIORDON,
Special Examiner.

585 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

Depositions of Witnesses Taken on Behalf of Plaintiff Before A. C. Rice, a Notary Public, Beginning Monday, July 12th, at 2 p. m., at the Office of Bradford & Doolittle, Rooms 1451-1455 Lemcke Annex, Indianapolis, Indiana, Pursuant to Notice and Agreement of Counsel.

Present:

Mr. E. W. Bradford, on behalf of plaintiff;
Mr. Francis Rawle, on behalf of defendant.

A. J. GARNER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.

A. A. J. Garner; 33 years; Yoakum, Texas; retail druggist.

586 Q. 2. How long have you been in the retail drug business?

A. About fifteen years altogether. The first two years at Hallettsville, then a year at Yoakum and then I was away from Yoakum about a year and since then have been located at Yoakum.

Q. 3. What is the name of the drug store or the firm owning the drug store where you are connected.

A. I am a partner in the business of the Weyman-Garner Drug Co.

Q. 4. Since you have been in the drug business at Yoakum have you handled a preparation called Quin-Coco?

A. Yes, sir.

Q. 5. From whom did you purchase this preparation?

A. Pfeiffer Chemical Co., I think was the firm, or Wm. R. Warner & Co. I am not sure which it was invoiced by.

Q. 6. When did you buy Quin-Coco first and give the name of the salesman, if you remember?

A. I don't remember the exact date of the first purchase. Probably four years ago. This purchase was made by the Weymouth Drug Co. and I was the manager of the business at the time. You understand that we, the Weyman-Garner Drug Co., succeeded the Weymouth Drug Co. I don't remember the name of the salesman.

Q. 7. In your experience as a retail druggist, have you ever handled a preparation known as Coco-Quinine?

A. I have.

Q. 8. How long have you been familiar with this preparation?

A. During my entire experience in the retail drug business.

Q. 9. On what representations did you purchase the Quin-Coco?

587 Mr. Rawle: Objected to because the only proper question is what was said by those parties.

A. Well, the salesman represented it to be the same preparation as Coco-Quinine, at a less price.

Q. 10. What else did he say to you with reference to Quin-Coco?

A. That you couldn't tell the difference in the taste, appearance of it, or the color of it, or the action of it. I suppose he meant from Coco-Quinine.

Q. 11. Did you have any doubt as to what he meant?

Mr. Rawle: Same objection.

A. No. None whatever.

Q. 12. Did he say anything to you about how Quin-Coco could be dispensed and if so, what did he say on this subject?

Mr. Rawle: Same objection and as leading.

A. Well he sold it to us for the same preparation as Coco-Quinine and evidently expected to use it for Coco-Quinine.

Mr. Rawle: Answer objected to as not testifying as to facts.

Q. 13. Did you so dispense it?

Mr. Rawle: The question is objected to as calling for res inter alios acta and as not affecting any right of the defendant.

A. We did.

Q. 14. In response to what kind of calls did you dispense Quin-Coco?

Mr. Rawle: Same objections.

A. On calls for Coco-Quinine.

Q. 15. On what kind of calls, over the counter or prescription calls?

Mr. Rawle: Same objection.

A. Both kinds of calls.

588 Q. 16. How did you label Quin-Coco when dispensed in response to such calls?

Mr. Rawle: Same objection.

A. As "Coco-Quinine."

Q. 17. Did you ever receive any complaints from customers or physicians to whom you had furnished Quin-Coco for Coco-Quinine?

Mr. Rawle: Same objections.

A. We had objections from one physician.

Q. 18. What was the physician's name?

Mr. Rawle: Same objection.

A. Dr. H. H. Brown.

Q. 19. What was the nature of his objection?

Mr. Rawle: Same objection.

A. He discussed that with our prescription clerk, at that time a Mr. Turner. I really don't know what he said.

Q. 20. Have you ever received a call from a customer for Quin-Coco?

A. I have not.

Q. 21. Have you ever received a prescription from a physician written for Quin-Coco?

A. I have not.

Q. 22. Do you have a considerable demand for Coco-Quinine?

A. We have.

Q. 23. Whose product do you recognize Coco-Quinine to be?

A. Eli Lilly & Company.

Direct-examination closed.

Mr. Rawle, not waiving the above objections, cross-examines as follows:

X Q. 24. Might it have been as long as five years ago that the Warner salesman called upon you?

589 A. I don't just remember. It may have been.

X Q. 25. Might it have been six years ago?

A. I am not exactly positive as to just how long?

X Q. 26. How did you happen to come so far from home in this matter?

A. Because Eli Lilly & Co. wanted me here.

X Q. 27. How large a place is Yoakum?

A. About seven thousand.

X Q. 28. How many drug stores?

A. Eight drug stores.

X Q. 29. How many doctors?

A. About twelve. Yoakum is half way between San Antonio and Houston, Texas.

X Q. 30. Is there a considerable demand for quinine products down there?

A. There is.

X Q. 31. Is it less or more than it was five or ten years ago, without considering the growth in population?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. It is effected a great deal by malarial conditions at different times.

X Q. 32. The more malaria, the more quinine?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 33. And on the whole without regard to increase in population, has malaria diminished in the last five or six years?

Mr. Bradford: Objected to as immaterial and incompetent and irrelevant.

A. I don't think there has been any great change either way.

X Q. 34. How much Quin-Coco did you buy from that salesman at that time?

A. One gallon.

X Q. 35. Did you stock Coco-Quinine at that time?

590 A. I don't remember whether we had any Coco-Quinine at that time or not.

X Q. 36. But you afterwards bought Coco-Quinine, didn't you?

A. We did.

X Q. 37. Did you afterwards buy any more Quin-Coco?

A. I am under the impression that we bought Quin-Coco three or four times. I don't remember how many times.

X Q. 38. About how long did that interview with the Quin-Coco salesman last?

A. A few minutes.

X Q. 39. Did he offer you any other items of the Warner line?

A. I don't remember whether they had the Warner line at that time or not.

X Q. 40. Did he offer you any other items of the line that he had?

A. Yes; they always do.

X Q. 41. About how many items in his line did he mention to you at that interview?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. I don't remember.

X Q. 42. Can you name any other items in his line that he offered to you at that time or that you talked about?

A. I could not. It has been too long.

X Q. 43. Do you remember whether you bought any other items in his line?

A. I think so.

X Q. 44. How many?

A. I don't know.

X Q. 45. Have the drug stores with which you have been connected carried quite a considerable line or stock of drugs and chemicals?

A. Yes, sir.

591 X Q. 46. Full stock?

A. Yes, sir. Largest in the city.

X Q. 47. Did this stock then and has it since included preparations having the same medicinal effect but made by several drug houses? I mean preparations that could be substituted one for the other with the same effect?

Mr. Bradford: Objected to as not cross-examination, immaterial and irrelevant.

A. Yes, sir.

X Q. 48. Are there a good many instances as such?

Mr. Bradford: Same objection.

A. Not in our business at the present time.

X Q. 49. Are there not a great many U. S. P. or N. F. preparations made and sold by several drug houses, several of which you carry at the same time?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 50. Are they interchangeable?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 51. And with the same medicinal effect as you understand it?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 52. And if such a preparation were called for without giving the name of the maker you would feel at liberty to sell the make of any house that you have in stock?

Mr. Bradford: Same objection.

A. I would, provided it were a U. S. P. or N. F. preparation.

X Q. 53. Do you stock any specialties made by more than one house but having the same medicinal effect?

592 Mr. Bradford: Same objection.

A. We do.

X Q. 54. How many?

Mr. Bradford: Same objection.

A. Probably—several.
X Q. 55. Can you name any?

Mr. Bradford: Same objection.

A. I could not recall the names of any at present.
X Q. 56. But you are sure there are some?

Mr. Bradford: Same objection.

A. Yes, sir.
X Q. 57. You have had calls for chocolate quinine?
A. I have.
X Q. 58. Do you have calls for sweet quinine or tasteless quinine or for any quinine preparation that is not bi.ter, under any other name?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. We have.
X Q. 59. Are the calls for chocolate quinine common?
A. No, sir.
X Q. 60. Do customers bring in bottles to be refilled?
A. They do.
X Q. 61. To a considerable extent?
A. Yes, sir.
X Q. 62. Do the larger part of the customers over the counter bring in bottles to be refilled?
A. No, sir.
X Q. 63. Half of them?
A. No—probably fifteen per cent.
X Q. 64. About what per cent call for chocolate quinine?
A. Not one per cent.
X Q. 65. Have you arranged to have your expenses paid by the plaintiff, for coming here?
A. Yes, sir.

Cross-examination closed.

593 Redirect examination.

By Mr. Bradford:

R. D. Q. 66. When you were first solicited by the salesman to purchase Quin-Coco, had you been selling Coco-Quinine at your store?

Mr. Rawle: Objected to as not proper for re-direct.

A. We had.

R. D. Q. 67. Was the demand for Coco-Quinine considerable at your store at that time?

Mr. Rawle: Same objection.

A. It was.

R. D. Q. 68. You stated that you were not sure whether you had any Coco-Quinine in the store when you bought the Quin-Coco, but on direct examination you stated that the salesman sought your order for Quin-Coco on the ground that it was the same thing as Coco-Quinine. Did the salesman ask you at the time in reference to your sales of Coco-Quinine or in reference to the demand for Coco-Quinine at your store?

Mr. Rawle: Same objection and as leading and irregular.

A. I don't remember.

R. D. Q. 69. Is it probable that you had Coco-Quinine in the store at that time?

Mr. Rawle: Same objection and because the probabilities are not evidence.

A. Yes, very probable.

R. D. Q. 70. Is Coco-Quinine a preparation that you had been carrying continuously in your store at that time?

A. It is.

R. D. Q. 71. And was the demand at your store a continuous demand?

A. It was.

594 R. D. Q. 72. Had you ever had customers call for Coco-Quinine by the name chocolate quinine, prior to that time?

Mr. Rawle: Same objection and as leading and because that it does not appear that the calls for chocolate quinine were for Coco-Quinine.

A. We had.

R. D. Q. 73. When a customer asks for chocolate quinine, what preparation do you understand is intended?

Mr. Rawle: Same objections and because the question is irrelevant if the witness' store is carrying only Coco-Quinine.

A. Coco-Quinine.

Redirect examination closed.

Recross-examination, not waiving objections.

By Mr. Rawle:

R. X Q. 74. If you were carrying only Quin-Coco and I came into the store and asked for chocolate quinine, what would you sell me?

A. Quin-Coco.

Recross-examination closed.

Re-redirect examination.

By Mr. Bradford:

R. R. D. Q. 75. What preparation would you understand the customer asked for by this name "chocolate quinine"?
A. Coco-Quinine.

Re-redirect examination closed.

Deposition closed.

A. J. GARNER.

595 G. H. TURNER, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.
A. G. H. Turner; 25; retail druggist. My home is in Mount Vernon, Texas.
Q. 2. Have you ever been employed by the Weyman-Garner Drug Co. or the Weymouth Drug Co., the predecessors of the Weyman-Garner Drug Co. at Yoakum, Texas, and if so, when were you employed at that store?
A. Yes, sir. I don't remember the exact date. I know when I quit there the last time it was July 6th, 1914. I had been there about 14 months, I think it — as near as I can remember, when I quit. The first time I was employed there was about three months. I expect it was about two years between my first employment and my last employment at that store.
Q. 3. Where were you employed during the two years you were away from the Weymouth Drug Co. store?
A. I worked in Muskogee after I left there, for the Hadley Drug Co. of Muskogee. I can't remember just how long I worked for the Hadley Drug Co. I came back to Yoakum and worked for the Mission Drug Store, E. J. Majors, proprietor. When I left there, I went out through Colorado and Washington for my health and stayed out at Bremerton, Washington, four months, and then came back to Yoakum and went to work for the Weyman-Garner Drug Co. and after leaving them I went to Muskogee and worked for Mr. Hadley again.
Q. 4. While you were employed by the Weymouth Drug Co. or the Weyman-Garner Drug Co. do you remember anything about
596 dispensing Coco-Quinine or Quin-Coco? If you do, what do you remember?

Mr. Rawle: Objected to as calling for res inter alios acta which doesn't affect the rights of the defendant.

A. Well, sir, I used Quin-Coco in Dr. Brown's prescriptions, when he had prescribed Coco-Quinine, Lilly.

Q. 5. Give Dr. Brown's full name?
A. Dr. H. H. Brown.
Q. 6. What happened in this matter?

Mr. Rawle: Same objection.

A. Well, he claimed that the Coco-Quinine he prescribed didn't give satisfaction; that the babies couldn't retain it on their stomachs and that Lilly was evidently doing business on his past reputation and that he was going to have to give up using it.
Q. 7. Had Dr. Brown previously prescribed Coco-Quinine, frequently?

Mr. Rawle: Same objection and as calling for hearsay.

A. Yes, sir.
Q. —. Did he quit prescribing Coco-Quinine?

Mr. Rawle: Same objection.

A. Yes, sir.
Q. 9. Had he ever made any complaint as to Coco-Quinine prior to the time you gave him Quin-Coco on his prescription for Coco-Quinine?

Mr. Rawle: Same objection.

A. No, sir; he had never said it before. When I began to work there, I filled his prescriptions with Quin-Coco and he complained of it on several occasions.

Q. 10. How were the bottles labeled by you in which Dr.
597 Brown's prescriptions for Coco-Quinine were dispensed?

Mr. Rawle: Same objection.

A. They were labeled to contain his directions in accordance with his prescription.
Q. 11. Did you dispense Quin-Coco over the counter when Coco-Quinine was called for?

Mr. Rawle: Same objection.

A. Yes, sir.
Q. 12. How did you label these bottles?

Mr. Rawle: Same objection.

A. "Coco-Quinine."

Direct-examination closed.

Mr. Rawle, not waiving the above objections, cross-examines as follows:

X Q. 13. What drug store are you working in now?
A. Hadley Drug Co., Oklahoma City.

X Q. 14. Did you come all the way from Oklahoma City to testify in this case?

A. No, sir; I came from Yoakum, Texas.

X Q. 15. At whose expense?

A. Lilly & Co.

NOTE.—Counsel for complainant makes of record the fact that all expenses incurred by witnesses attending the taking of depositions here today and tomorrow are paid or are to be paid by complainant, it being the least expensive method of securing the evidence which could be arranged by him.

X Q. 16. Did you sell drugs over the counter?

A. Yes, sir.

X Q. 17. Did they used to bring in bottles to be refilled with the chocolate quinine preparation?

Mr. Bradford: Objected to as not cross-examination.

598 A. I could not be positive that they ever have, but I feel sure they have.

X Q. 18. Did the customers sometimes ask for chocolate quinine?

A. Well, I have had them ask for chocolate quinine. Coco-Quinine is generally asked for. Most everyone asks for Coco-Quinine.

X Q. 19. Did you sell it in small bottles?

A. Any amount they wanted from ten cents worth up.

X Q. 20. Did they bring these bottles in to be refilled?

A. I could not say.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 21. When a customer asked for chocolate quinine, whose preparation did you understand was asked for?

A. Well, I tell you. I don't know whether they ever asked for "chocolate." Some of them say Coco-Quinine, "that chocolate kind." Something like that from a person who is not familiar with it.

R. D. Q. 22. But whose preparation would you understand they wanted?

A. Well in a question like that, of course I always think they want Lilly's.

Redirect examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

R. X Q. 23. And if you had a chocolate quinine of some other make and none of Lilly's, you would give them the other make, would you?

A. Yes, sir.

Recross-examination closed.

Deposition closed. G. H. TURNER.

599 JOHN F. WHITLEY, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. John F. Whitley; 41; residence, Winfield, Louisiana; retail pharmacist. I am the president of the Winfield Drug Co.

Q. 2. Do you handle a preparation at your store known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose preparation do you recognize this to be?

A. Eli Lilly & Co.

Q. 4. How long have you handled it?

A. Something like ten years.

Q. 5. Do you have a considerable demand for it?

A. Yes, sir. Very good.

Q. 6. Has this demand been continuous all the time?

A. Yes, sir.

Q. 7. How do you dispense it?

A. We dispense it on doctors' prescriptions and sell it over the counter. People who have learned what it is, ask for it.

Q. 8. Have you ever received a prescription written for Quin-Coco?

A. No, sir.

Q. 9. Have you ever had a customer call for Quin-Coco?

A. No, sir.

Q. 10. Have you ever been solicited to purchase Quin-Coco?

A. Yes, sir.

Q. 11. By whom?

600 A. I have been by the representative of, I think it was, the Pfeiffer Chemical Co. at that time. I have been buying goods from them ever since and they have changed and now bill the goods William R. Warner & Co. But it is the same salesman that sold it before.

Q. 12. What did the salesman say to you in reference to Quin-Coco, as near as you can remember?

A. Well, in going over the items we would be buying, he told us that he wanted us to let him make us prices on Quin-Coco; that we could save considerable money. He saw that we had a considerable trade on Coco-Quinine and he wanted to give us prices on Quin-Coco, where we would save money by using it.

Q. 13. What else did he say to you in reference to it?

A. Well, he said it was an identical preparation to Coco-Quinine; that we could sell it on the same prescriptions as we had been selling the Coco-Quinine.

Q. 14. Did you buy the Quin-Coco on these representations?

A. Yes, sir.

Q. 15. Did you dispense the Quin-Coco, and if so, how?

A. I dispensed it as we had been disposing Coco-Quinine; on prescriptions and calls.

Mr. Rawle: Objected to as res inter alios acta and not binding on the defendant.

Q. 16. What product was designated on the prescriptions which you filled with Quin-Coco?

Mr. Rawle: Same objection.

A. Coco-Quinine.
Q. 17. Did you dispense Quin-Coco when customers asked for Coco-Quinine over the counter?

Mr. Rawle: Same objection.

A. Yes, sir.
Q. 18. How did you label it?

Mr. Rawle: Same objection.

601 A. We had, as a rule, a printed label which was printed "Coco-Quinine," which we used.
Q. 19. Did you ever receive any complaints from physicians or customers in reference to he product Quin-Coco when you had dispensed it as Coco-Quinine?

Mr. Rawle: Same objection.

A. I had several bottles of it returned.
Q. 20. Was this by physicians or customers?

Mr. Rawle: Same objection.

A. By customers.
Q. 21. Why was it returned?

Mr. Rawle: Same objection.

A. They said that it had thickened so they could not get it out of the bottle.
Q. 22. Did you continue buying and using Quin-Coco?

Mr. Rawle: Same objection.

A. No, sir.
Q. 23. Why did you discontinue using Quin-Coco?

Mr. Rawle: Same objection.

A. After the customers complained, I did not buy any more.

Direct examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

X Q. 24. When were you solicited by the Pfeiffer Chemical Co. man to buy Quin-Coco?
A. It was about four years ago.
X Q. 25. Were you the purchasing man in your store at that time?

A. Yes, sir. But the store was run under the name of Whitley & Thomas, at that time.

X Q. 26. What was the name of the Pfeiffer salesman?

602 A. Wilkins.

X Q. 27. What time of the year was it he was there?

A. I think it was either December or January.

X Q. 28. Four years ago last December or January?

A. Yes, I think so.

X Q. 29. Did he see you personally?

A. Yes, sir.

X Q. 30. Had he dealt with you before?

A. Yes, sir; he had dealt with me at Dodson, Louisiana, where I had another store.

X Q. 31. Had he showed you Quin-Coco there?

A. I don't remember whether he did or not. It strikes me that he did, but I wouldn't say positive as I do not remember.

X Q. 32. Was this the first time he solicited trade from you personally at this establishment?

A. Yes, sir. But he had sold my partner.

X Q. 33. Did you buy any other items of his line at that time?

A. Yes, sir.

X Q. 34. Had you know him before that time?

A. Yes, sir.

X Q. 35. Could you describe him?

A. Yes, sir.

X Q. 36. Was he a pretty good salesman?

A. Pretty fair.

X Q. 37. When he offered you Quin-Coco that time about how long did the interview last?

A. Well, I suppose something like an hour or so.

X Q. 38. Did he go over a considerable number of items in his line?

A. Yes, sir.

X Q. 39. About how many items do you suppose?

A. About six or eight thousand. There are about 20 lines that he carries, all kinds of perfumes and different things.

X Q. 40. What did he say to you about buying his perfumes?

603 Mr. Bradford: Objected to as immaterial, irrelevant and not cross-examination.

A. Well, he said that he had a good line of Mellier's perfumes.

X Q. 41. Did he display any samples of them?

Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 42. Did you understand from this salesman that Quin-Coco is a competing preparation with Coco-Quinine?

A. Well, he said it was the same thing, two grains of quinine to the dra-hm, put up in chocolate.

X Q. 43. Now can you tell me the very words that he used in referring to its use on prescriptions?

A. Well, he said it was precisely the same thing and could be used just as we were using the Coco-Quinine.

X Q. 44. If a pharmacist dispenses one drug when another is called for in a prescription, is this considered an honest business among pharmacists?

A. No, if there is any difference in the preparations.

X Q. 45. Then if you, as a pharmacist, consider that one preparation is just the same as another medicinal, do you feel at liberty to substitute one for the other on a physician's prescription?

A. Yes, sir.

X Q. 46. Do you carry a good many items of preparations which are similar in medicinal effect but are made by different houses?

Mr. Bradford: Objected to as not cross-examination and abuse of the right of cross-examination and immaterial and irrelevant.

A. Yes, sir.

X Q. 47. Does this apply to the U. S. P. and N. F. lines?

604 Mr. Bradford: Same objection.

A. Yes, sir.

X Q. 48. Does it apply to any specialties?

Mr. Bradford: Same objection.

A. No, sir.

X Q. 49. Sure?

Mr. Bradford: Same objection.

A. Well, not as a rule.

X Q. 50. Then I understand you to say that in your view, all these interchangeable preparations can be use indifferently, one for the other?

Mr. Bradford: Same objection.

A. No, I don't think they can all be used one for the other.

X Q. 51. Can they be used one for the other when they are similar?

Mr. Bradford: Same objection.

A. Not when they are similar but when they are identical.

X Q. 52. By identical you mean identical in medicinal effect?

Mr. Bradford: Same objection.

A. No, I mean in every way. No difference whatever.

X Q. 53. Then isn't that what the salesman told you was the case with Quin-Coco; that it was identical in every respect with Coco-Quinine, no difference whatever?

A. Yes.

X Q. 54. And isn't that really all he told you?

A. Yes, except that the said I would save money by using it and that we could dispense it the same way on calls for Coco-Quinine.

X Q. 55. Are you quite sure that he said you could dis-
605 pense it in the same way or that it was only your inference that you could?

A. He told me that I could use it and that they were using it all over his territory for Coco-Quinine.

X Q. 56. Then by that he meant that it was taking the place of Coco-Quinine in his territory?

A. It would appear to me that he was selling it and they were using it in place of Coco-Quinine.

X Q. 57. How large a place is Winfield, Louisiana?

A. Three or four thousand and it has two drug stores and four doctors.

X Q. 58. Do you personally attend to the business of selling over the counter?

A. Well, yes, sir. Fill prescriptions and sell over the counter.

X Q. 59. And do your customers buy chocolate quinine preparation in bottles and then bring the bottles back to be refilled?

A. I don't remember having them bring a bottle back to refill it.

X Q. 60. Do the customers ever call for chocolate quinine?

A. I may have had one or two calls, but very few.

X Q. 61. Did they ever ask you for sweet quinine or tasteless quinine?

A. Yes, sir. They then mean Febriline. If they get anything else they bring it back every time.

X Q. 62. Have you continued to do business with this Pfeiffer or Warner salesman up to date?

A. Yes, sir.

X Q. 63. How often does he call?

A. Three or four times a year.

X Q. 64. Is he a square salesman?

A. Yes, sir; a mighty good man.

Cross-examination closed.

Deposition closed.

JOHN F. WHITLEY.

606 C. J. THURMAN, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation?

A. C. J. Thurman; 43; Omaha, Nebraska; traveling salesman representing Nelson, Baker & Co., of Detroit, manufacturers of pharmaceuticals. I represent them in part of Nebraska, the larger part of Iowa and the Eastern half of South Dakota.

Q. 2. How long have you been employed by Nelson, Baker & Co.?

A. Two and a half years.

Q. 3. By whom were you employed prior to that time?

A. The Pfeiffer Chemical Co.

Q. 4. How long were you employed by the Pfeiffer Chemical Co.?

A. Ten years. Went with them in 1903 and finished the year of 1912.

Q. 5. Did you also represent Wm. R. Warner & Co.?

A. Yes, sir. We handled the Warner line. After Warner was bought by the Pfeiffer Chemical Co. I sold the Warner line.

Q. 6. While you were selling the Warner line or the line of the Pfeiffer Chemical Co. did you sell a product which was called Quin-Coco?

A. Yes, sir; I did.

Q. 7. Please explain the methods and arguments you employed in soliciting orders for Quin-Coco and where you obtained your authority for such methods and arguments?

Mr. Rawle: Objected to because the authorities should first be shown and because the general statements of methods by the
607 witness is not evidence nor is anything except a specific statement of facts.

A. Quin-Coco was sold under the Searle & Hereth label. The preparation of Quin-Coco was put on the market by the Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co., but was not pushed to any extent until after the purchase of the Searle & Hereth Co. We were instructed principally by Mr. Garwin who had charge of the pharmaceutical laboratory for the Pfeiffer Chemical Co. at that time. We were instructed by Mr. Garwin to recommend to the trade that the preparation of Quin-Coco was exactly the same as the preparation of Coco-Quinine put out by Eli Lilly & Co.; to tell the trade that Quin-Coco was identical with Coco-Quinine and our argument to get business on this preparation was to explain to the trade that our preparation of Quin-Coco was much cheaper and would answer every purpose of the Coco-Quinine and to explain to them how much money could be saved by buying Quin-Coco instead of Coco-Quinine. We were also instructed by office managers, circular letters to salesmen, etc., to push this Quin-Coco as a substitute for Coco-Quinine, the same as per instructions from Mr. Garwin. This Quin-Coco was one of the best selling specialties of the company.

Mr. Rawle objects to the answer so far as it refers to circular letters and the like not produced by the witness, also so far as it makes general statements as to instructions without giving the language used by the instructor and the names of the instructors.

Q. 8. Do you recall the names of any officers or men in authority from whom you obtained instruction or information relative to the sale of Quin-Coco as a substitute for Coco-Quinine, other than Mr. Garwin? If so, please state.

A. Yes, sir. There was Mr. Garfield Merner who was
608 manager of the St. Louis Co. Mr. H. Pfeiffer, who was President of the Pfeiffer Chemical Co. and has traveled with me on the road at numerous times. That is about all that I can

recollect I got direct instruction from. I would like to state that Mr. Garwin who had charge of the laboratory for the Pfeiffer Chemical Co. at St. Louis, always kept a bottle of Coco-Quinine in stock in his laboratory. In his instructions to the salesmen he would present a bottle of Coco-Quinine of Eli Lilly & Co. and also a bottle of Quin-Coco for our inspection, and would endeavor to show us where the Quin-Coco was exactly the same as Coco-Quinine. Mr. Garwin was very enthusiastic on this particular preparation of Quin-Coco.

Q. 9. You spoke of Mr. H. Pfeiffer traveling with you or being with you on some of your trips. Was he with you on some of the trips when you pushed the sale of Quin-Coco?

A. Yes, sir.

Q. 10. Did he participate with you in pushing this specialty?

A. The fact of the matter is that Mr. H. Pfeiffer knew very little about pharmaceuticals and he invariably left the selling of pharmaceuticals to me at the time he was with me but his instructions were always given to me privately. Mr. Pfeiffer never claimed to know anything about the pharmaceutical line but he did a great deal of the selling of the Pfeiffer Chemical Co. line while with me.

Q. 11. Do you know anything about the history of the preparation of Quin-Coco by the Pfeiffer Chemical Company? If so, will you please state what you know?

A. The preparation of Quin-Coco was perfected by Mr. Garwin who had charge of the laboratory since the organization of the Pfeiffer Chemical Co. This preparation was placed on the market by the Pfeiffer Company in 1905 but was not pushed to any extent until after the purchase of the Searle & Hereth Co. by the
609 Pfeiffer Chemical Co. as it was not perfected until after the time of the buying of the Searle & Hereth Co. The Searle & Hereth Co. was bought by the Pfeiffer people in 1906. Since that time they have pushed Quin-Coco as one of the leading specialties of the Searle & Hereth line.

Q. 12. Did your representations to the retail druggists include instructions to them as to how they could dispense it and if so, what did you tell them on that point?

Mr. Rawle objected to the question as inadmissible, as calling for vague generalities and not for facts and names.

A. We were instructed by the company to tell the trade that this preparation of Quin-Coco could be used and dispensed on calls for Coco-Quinine; and, that it could also be used on prescriptions for Coco-Quinine without the knowledge of the physician or the patient, as the preparation of Quin-Coco was exactly the same as Coco-Quinine.

Q. 13. Have you any evidence other than your memory as to the statement that Quin-Coco was prepared by the Pfeiffer Chemical Co. prior to its acquisition of the Searle & Hereth Company?

A. Yes, sir. I would like to present here a catalogue issued by the Pfeiffer Chemical Co. previous to their buying the Searle & Hereth Co. This catalogue lists Quin-Coco on page 106. This cata-

logue, I think, was issued in 1905. At any rate, it was issued before the purchase of the Searle & Hereth Co. of which I am very sure.

Mr. Rawle objects to all the testimony of the witness relating to any fact occurring before July 1908 because it appears that before that date the defendant had no connection with Pfeiffer Chemical Co. or Searle & Hereth Co.

The catalogue referred to in the witness' last answer is of-
610 fered in evidence and marked "Complainant's Exhibit Thurman Pfeiffer Chemical Co. Catalogue."

Mr. Rawle objects to the offer for the same reason.

Q. 14. There has been offered in evidence a Searle & Hereth Co. Catalogue of 1906 marked "Complainant's Exhibit Searle & Hereth 1906 Catalogue." I show you this exhibit and ask you if you are familiar with the same.

A. Yes, sir. I have a copy of the same before me of the same edition, my salesmen's catalogue.

Q. 15. What do you know in reference to that catalogue?

A. This catalogue was issued by the Searle & Hereth Co. before selling out to the Pfeiffer Chemical Co. in 1906,—the last catalogue issued by the Searle & Hereth Co.

Q. 16. Have you a copy of the first Searle & Hereth catalogue issued after this company was acquired by the Pfeiffer Chemical Company?

Mr. Rawle objects for the same reason.

A. I have here the first Searle & Hereth Co. catalogue issued by the Pfeiffer Chemical Co. under date of 1908 and 9. This is the first Searle & Hereth catalogue issued by the Pfeiffer Chemical Co. after the purchase of the Searle & Hereth Co. This catalogue lists Quin-Coco, page 167, listed under the specialties of the Searle & Hereth Co.

The catalogue in question is offered in evidence and marked "Complainant's Exhibit Pfeiffer-Searle & Hereth Catalogue 1908-1909.

Mr. Rawle: Same objection.

Q. 17. I show you a document marked "Complainant's Exhibit R. J. Grove's copy of Document No. 3" and ask you if you ever saw a document like this before and if you can explain to us what it is?

A. I am familiar with this list which was known to us as a
611 "replacer" list. I have had in my possession an exact copy of this list. I have here in my possession a revised "replacer" list which is virtually the same as the list presented me here, containing a few more preparations.

The revised "replacer" list referred to is produced and offered in evidence and marked "Plaintiff's Exhibit Thurman Copy of Document No. 3."

Mr. Rawle objects to the offer unless it is shown as having been used by the witness after July, 1908.

Q. 18. For what purpose were these lists used by the Pfeiffer-Warner salesmen?

Mr. Rawle: Objected to for the same reasons and for the further reason that the witness can only speak as to his own use.

A. These lists were furnished to us by the Pfeiffer Chemical Co. and known to us salesmen as a "replacer" list showing preparations put out by the different companies and also showing replacer preparations, to replace such different preparations, put out by the Pfeiffer Chemical Co.; showing prices of the original preparations and corresponding prices of the replacer preparations put out by the Pfeiffer Chemical Co.

Q. 19. Do you recall when the line known as the Warner line was added to your sales list?

A. No, I could not give the exact date. Really I could not. I really don't remember. I have no way of knowing the time the Warner Company was purchased by the Pfeiffer Chemical Co.

Mr. Rawle states that the connections between the Pfeiffer Chemical Co. and the defendant took place about July, 1908.

Q. 20. Were the sales of Quin-Coco by you continued up
612 to the time of the severance of your connection with these companies?

A. Yes, sir.

Q. 21. And by the same methods which you have previously testified you used?

A. Yes, sir; the same methods.

Direct-examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

X Q. 22. About how many items did you have on all your lines after the Warner Co. came in?

A. Well, I would not be prepared to say.

X Q. 23. Were there on the Warner, Pfeiffer and Searle & Hereth lines as many as three thousand items which you were selling?

A. Yes, I would think so.

X Q. 24. Were there as many as 5,000 items?

A. That I would not be prepared to say. I never took any particular pains to look up how many items there were in the line. There were plenty anyhow.

X Q. 25. What was the earliest date which you had in your possession as a salesman a copy of "Complainant's Exhibit R. J. Groves' Copy of Document No. 3?"

A. Well, I would not be prepared to say when I got that copy.

X Q. 26. Did you have it within a year after you first entered the employ of the Pfeiffer Chemical Co., which was in 1903?

A. I think the first copy I received of the replacer list was in 1903.

I never made any memorandum of dates of the time of receiving these copies.

X Q. 27. Did you continue to use such a list as long as you were with the concern or did something take its place?

A. Well, these lists were replaced by new lists from time to
613 time as new preparations were being added to the list. We at different times received quite a few copies of these lists.

X Q. 28. When you left these people in 1912, were you using one of these lists as a part of your equipment as a salesman?

A. Yes, sir. I was using this for my personal reference up to the time of my leaving the company. However, these lists were discontinued before my leaving the company.

X Q. 29. How long before?

A. I don't know.

X Q. 30. A year.

A. I would not be prepared to say. But I used these lists as long as I was employed by the Pfeiffer Chemical Co. They were never called in by the company.

X Q. 31. Looking at this document No. 3, I understand that the right-hand column covers entirely the lines which you were selling. Is that correct?

A. Yes, sir.

X Q. 32. And the left-hand column contains the items sold by other houses with which you were in competition. Is that correct?

A. Yes, sir. Except I notice in one or two items as to which there was no competing house, these seem to have been placed in the left-hand column with a blank in the right-hand column.

X Q. 33. Were there not many thousand items on your lists as to which there were competitive and similar items on the lists of other houses?

Mr. Bradford: This and the last two preceding questions objected to as not cross-examination and as immaterial and irrelevant.

A. No, I don't think so. Not many thousand.

X Q. 34. Were there as many as one thousand?

Mr. Bradford: Same objection.

A. No, sir; I don't think so.

614 X Q. 35. Were there five hundred?

Mr. Bradford: Same objection.

A. I don't think there were that many.

X Q. 36. I see that the document No. 3 contains about 150 items. Is this all the items which you were selling as to which competitive houses were selling similar items having the same medicinal effect?

Mr. Bradford: Same objection.

A. Practically so. Yes.

X Q. 37. Do you mean to say that except for the items on the Document No. 3 you were offering for sale many thousands of items as to which there was no competition?

Mr. Bradford: Same objection.

A. No, sir; there was competition, practically on the entire line as far as that is concerned.

X Q. 38. Then why did you just say that there were not 500 items in all your lines taken together as to which you had competition?

Mr. Bradford: Same objection.

A. I thought you had reference to these "replacer" preparations and substitutes, as listed on this replacer list.

X Q. 39. I now ask you whether it is not true that, taking all the items you are offering for sale, all or nearly all of them were in competition with items having the same medicinal effect when put on the market by other houses.

Mr. Bradford: Same objection.

A. Well, yes, all houses make practically the same line excepting what is termed "specialties" made by the different houses.

X Q. 40. Then except as to your specialties you were in competition with similar items along the whole line?

Mr. Bradford: Same objection.

615 A. Yes, sir.

X Q. 41. If in soliciting a druggist's business, the druggist had said to you that he had been using "Mecauro," Charles Rome Parmalee Co., and asked what item you had of similar medicinal effect, what would you have told him. Answer without looking at the blue list.

Mr. Bradford: Same objection.

A. I would call his attention to this particular preparation listed in the replacer list to take the place of the preparation named by him as being an exact reproduction of, or substitute for, the preparation named by the druggist.

X Q. 42. I am asking you to say now from memory and without looking at the document No. 3 what you would have offered such a druggist in response to his question.

Mr. Bradford: Same objection.

A. The fact of the matter is that I have paid no attention at all to this list in question since my leaving the Pfeiffer Chemical Co. and most of those preparations that I am not particularly familiar with have passed out of my mind.

X Q. 43. Do you mean to say that when you were in the employ of these people, you could have answered such a question offhand, without looking at the document No. 3?

Mr. Bradford: Same objection.

A. In most cases I could. Of course where I was unable to remember the preparations as substitutes of different preparations

named, I simply referred to the list, document No. 3, as that was what we were carrying the list for; as a salesman's reference.

X Q. 44. Then Document No. 3 was, as to the items covered by it, a sort of ready reference index to the complete catalogue of
616 your company, being such a one as is now marked "Complainant's Exhibit Searle & Hereth, 1906 Catalogue"?

Mr. Bradford: Same objection.

A. These lists were furnished to us as an addition to the catalogue which would enable us to quote prices on substitute preparations as listed in this replacer list.

X Q. 45. If a druggist had asked you to name a Searle & Hereth preparation which was similar in medicinal effect to Mercauro, Charles Rome Parmalee Company, please look at the Searle & Hereth 1906 catalogue and state what you would have named to him?

Mr. Bradford: Same objection.

A. Well, I would not have referred to the catalogue at all, because these substitutions for different preparations were not listed in the catalogue but were listed in the list known as the "replacer list" in question.

X Q. 46. But you have testified that as to practically all your line you were in competition with drugs of similar medicinal effect sold by one or more other houses. Is that not true?

Mr. Bradford: Same objection.

A. I was referring to what is termed legitimate competition and staple pharmaceutical preparations.

X Q. 47. Was Mercauro, Charles Rome Parmalee Co., a staple pharmaceutical preparation?

Mr. Bradford: Same objection.

A. This preparation was considered a staple specialty for which the Pfeiffer Chemical Co. offered a substitute as named in this list.

X Q. 48. Turn to the Pfeiffer Chemical Co. 1906 Catalogue and show where the Searle & Hereth competitive article for Mercauro, Parmalee, is found.

Mr. Bradford: Same objection.

617 A. I can't recall the name of the substitute offered for this article. It would be necessary for me to know the name of this substitute in order to find it in the catalogue. I have not paid any attention to this since my leaving the company.

X Q. 49. Could you have remembered the name of the Searle & Hereth article, when you were with the company?

Mr. Bradford: Same objection.

A. Yes, I probably could.

X Q. 50. You have just used the word "substitute." Do you use

that in the same sense in which you have just been using the word "replacer?"

A. Yes, sir.

X Q. 51. And I take it that you mean by both of those words an article which you were selling which was in competition with a similar article of another house? Is that correct?

A. No, not exactly.

X Q. 52. Then in what sense have you used those two words?

A. As a substitute and replacer for original preparations made by the different companies.

X Q. 53. Don't you mean by "substitute" and "replacer," articles which you were offering and which were in competition with similar articles of other houses?

A. Yes, I guess that's right.

X Q. 54. I take it then that if a druggist had stated to you that he had been dispensing a given preparation and asked if you had any preparation in your line of similar medicinal effect, you would look at your blue list "Document No. 3" to ascertain the name of your article. Is that correct?

A. That is correct.

X Q. 55. And if the name of your article that answered to his question was not on the blue list Document No. 3, you would
618 then consult the catalogue or catalogues of your various houses.

A. No, sir. Because all that were termed by us replacers or substitutes were printed on this list in question.

X Q. 56. You do not understand. I am asking you whether if a druggist said to you that he had been using a certain drug of a certain house other than yours, and asked if you could sell him anything that he could use in its place of similar medicinal effect and you could not answer the question from the blue print list Document No. 3, where would you get the information to answer him?

A. I would perhaps look in the catalogue for a similar preparation to the one inquired for by the druggist.

X Q. 57. Then the blue list Document No. 3 was a partial list of items of which with many others, many thousands of others, were found in the various trade catalogues of your houses? I refer only to the items on the blue list which were put out by your various houses.

A. The many items that were referred to listed in the different catalogues are what is termed staple pharmaceuticals which are listed by legitimate competition. The blue list as referred to as Document No. 6 contains the leading sellers and original specialties put out by the different houses and for which substitute preparations are offered by the Pfeiffer Chemical Co.

X Q. 58. Are all the items on the blue list marked with the name of your house found in the catalogues of that house?

A. Yes.

X Q. 59. If you offered a druggist a regular pharmaceutical found in your catalogue but not found on your blue list No. 3 to be used by

him in place of a like article which he had been using and
619 had bought from another house, would he not be replacing the article of the other house with your article?

A. Unless this preparation happened to be a standard preparation. Because if this preparation happened to be a standard or U. S. P. it would have been made by all pharmaceutical houses and would not be termed a "replacer."

X Q. 60. In such case would it not be in fact a "replacer" if he gave up his use of the article of the other house and took and sold yours?

Mr. Bradford: Objected to as merely calling for the opinion of the witness and entirely immaterial and irrelevant.

A. Not if this preparation was standard and made by a legitimate pharmaceutical house.

X Q. 61. In ordinary English language, if I use one article and give it up and use another, I would say that the latter was substituted for or was a replacer for the former. Is that not true?

Mr. Bradford: Same objection.

A. No, not exactly. I think my answer covers that.

X Q. 62. Referring to the blue list "Groves' Document No. 3" do you know whether all the articles marked with the name of your house on that list were put on the market by your company subsequently to their being put on the market as to the corresponding item by other houses?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Yes, sir.

X Q. 63. I will ask you to run your eye down the blue list "Grooves' Document No. 3" and see if you have any other answer to make to the question.

Mr. Bradford: Same objection.

A. Well, with this one possible exception as spoken of be-
620 fore, this preparation of Quin-Coco, Laxative. This list Groves' Document No. 3 was evidently issued by the Pfeiffer Co. before the purchase of the Wm. R. Warner Co. and contains several of the Wm. R. Warner Co. preparations in the left-hand column of this list and also substitute preparations which are listed in the right-hand column to substitute and replace these Warner preparations.

X Q. 64. Question repeated.

A. Well, I have no different answer to make. That covers it.

X Q. 65. Then you now state, referring to the blue list "Groves' Document No. 3" that every item on that list put out by your house was put out later than the corresponding item put out by the other house? Is that correct?

Mr. Bradford: Same objection.

A. With possibly a very few exceptions.

X Q. 66. Please indicate the exceptions.

Mr. Bradford: Same objection and also as incompetent, the witness not having qualified as to knowledge of time when all these preparations were put on the market.

A. Well, I am not in position to state the exceptions.

X Q. 67. Do you mean that you cannot now state them?

A. Yes, sir.

X Q. 68. If one of your druggists had been using a given standard preparation and he then bought a similar standard preparation of your house and used it, would he not be using that as a substitute or replacer?

A. No, sir.

X Q. 69. If after buying your standard preparation a prescription came in specifying the standard preparation of the other house and without informing the physician he used yours in place of the one in the prescription, what would you call that?

621 A. If the preparation in question was U. S. P. or standard as you put it, in the question, he would not be using a substitute.

X Q. 70. Assuming that your druggist had a prescription specifying a standard drug, Parke-Davis, and he filled it by using a like standard drug of Searle & Hereth. What would you call that, if he did not tell the physician?

A. If the Searle & Hereth preparation you speak of was standard, U. S. P., he would not be using a substitute preparation.

X Q. 71. Then in selling for your present house Standard U. S. P. preparations do you think it no harm to urge upon your druggist who has been using such standard preparation of another house, that he can give that up and use the preparation of your house on a prescription specifying specifically the standard drug of the other house?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Unless the preparation, or prescription rather, specified some particular make by the Doctor, he would not be substituting in using standard preparations made by my company. If the Doctor's prescription specified any particular make of this standard preparation, and he used any other make, he would in a way be substituting.

X Q. 72. Then you would not think it the part of an honest salesman to suggest to the druggist in such a case he should buy from and substitute on prescriptions specifying the make of another house, would you?

A. I would not advise any druggist where the prescription written by the Doctor specified any particular make of a pharmaceutical preparation, to use a preparation of any other make.

X Q. 73. Why wouldn't you advise it?

A. Well, because the druggist should respect his Doctor to
622 the extent of furnishing the particular preparations as specified in the prescription.

X Q. 74. And the doctors and the best druggists do not consider it honest not to follow the Doctor's prescription in such a case?

A. That is correct.

X Q. 75. And you don't consider it honest business, do you?

A. No.

X Q. 76. And you don't do it, do you?

A. Not when I clerked in a drug store, I certainly did not follow any such practice.

X Q. 77. And you do not consider it honest as a salesman, do you, to advise or suggest such practice?

A. A salesman is compelled to follow the instructions of the house he represents.

X Q. 78. Even if they instruct him to do a dishonest thing?

A. If he remains in the employ of the house, he is compelled to follow the instruction of the house as he is expected to show a certain amount of sales on these particular items as termed specialties, substitutes and replacers, which show a greater profit than what is termed staple pharmaceuticals.

X Q. 79. Then from 1903 to 1912 you systematically played the part of a dishonest salesman, did you?

A. I do not know whether you would term it that way, or not.

X Q. 80. How do you term it, in view of just what has been said?

A. It is simply following the instructions of the house. If the salesman was dishonest, the house was certainly more dishonest in instructing the sales man to do this.

X Q. 81. When did Garwin give you instructions? Was it when you started in 1903?

A. Well, it was a little later that they began putting out this list, probably 1905.

623 X Q. 82. And was that the time Merner talked with you?

A. Yes, and later than that.

X Q. 83. How much later?

A. Well, up to the time that I left the employ of the company, December, 1912.

X Q. 84. What did he say to you?

A. Well, his instructions to us were about the same as Mr. Garwin's: that these preparations were exact substitutes for the original preparations named by the other companies. He also instructed us that Quin-Coco could be used on Doctor's prescriptions where Coco-Quinine was specified and for us to show the druggist how much he could save by buying this substitute and replacer preparation from our company and that there was no use of a druggist paying the price for these original preparations when he could buy something that would answer all purposes and save him quite a little money.

X Q. 85. Anything else?

A. No.

X Q. 86. What did Mr. H. Pfeiffer say to you?

A. Well, his instructions were practically the same as were given

by Mr. Garwin and Mr. Merner, although Mr. H. Pfeiffer has been on the territory with me a great many times and possibly has said more than Mr. Merner in regard to pushing these different preparations, substitutes and replacers.

X Q. 87. Do you mean that Mr. H. Pfeiffer said more things to you about it or spoke to you more frequently?

A. Spoke to me about it more frequently.

X Q. 88. Did Mr. Garwin instruct you on these points after July, 1908?

A. Yes, sir.

X Q. 89. Did you have as salesman for Warner & Co. a book which has been sometimes called "Salesmen Confidential"?

624 Mr. Bradford: Objected to as not cross-examination, immaterial and irrelevant.

A. Yes, sir. I had this list after it was issued and used it until I returned it to the company when I left them. We were charged $5.00 for this list and when I left them I returned it to the company and got the $5.00 for it.

X Q. 90. Who wrote the circular letters of instructions which you spoke about?

A. Well, they were written by different people at different times, both from the St. Louis office and Philadelphia office of the Wm. R. Warner & Co.

X Q. 91. Up to how late a date did Mr. H. Pfeiffer travel with you?

A. Well, I would not be prepared to say exactly but he hadn't been with me for possibly five years before I left the company, December 31, 1912.

X Q. 92. Did you resign?

A. No, sir; I did not.

X Q. 93. Was there any trouble between you?

A. No; not any particular trouble excepting that I had asked for a raise in salary for several years and they virtually promised to give it to me each year and when I put it to them in the way that I was going to quit, if I didn't get a raise in salary, I was discharged December 13, 1912, because they did not see fit to raise my salary. The discharge was to take effect December 31, 1912, the letter was dictated on December 13th, 1912, by Mr. Garfield Merner.

X Q. 94. When did you make your first sale of Quin-Coco, Searle & Hereth?

A. I don't remember.

X Q. 95. When you were selling in the early days, did you run across Lilly salesman?

Mr. Bradford: Objected to as immaterial and irrelevant and not cross-examination.

A. Yes, sir.

625 X Q. 96. Did they know you were offering Quin-Coco?

Mr. Bradford: Same objection.

A. Yes, sir; offering it for sale, I suppose you mean?

X Q. 97. I understand you have come from Omaha, Nebraska, here for the sole purpose of testifying in this case. Is that true?

A. Yes, sir.

X Q. 98. Who pays your expenses?

A. They will be paid by the Lilly people, I suppose.

X Q. 99. Is it so understood between you?

A. It has never been understood between me and the Lilly people, no; but I naturally supposed they would. They never told me they would.

X Q. 100. And you are spending two days in Indianapolis?

A. Yes, sir.

X Q. 101. And are being entertained here by the Lilly Company?

A. Yes, sir.

X Q. 102. And stopping at the Claypool Hotel?

A. Yes, sir.

X Q. 103. Please turn to the Searle-Hereth 1906 Catalogue and take out from it a standard U. S. P. drug or preparation that has been in quite common use among druggists. Select one that was sold by several houses.

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Take for instance, Syrup of Sarsaparilla Compound U. S. P., on page 72.

X Q. 104. Is the same U. S. P. preparation sold by other houses?

Mr. Bradford: Same objection.

A. Supposed to be, yes, the standard is supposed to be exactly the same.

626 X Q. 105. Would you consider it honest to suggest to a druggist customer to buy that preparation made by your house and use it on prescriptions expressly specifying that preparation made by another house?

Mr. Bradford: Objected to as witness has already answered this question and for the further reason that it is absolutely immaterial and irrelevant to any issue in this cause.

A. I would not.

X Q. 106. What territory did you cover after you got the Warner list?

A. All of Nebraska and the Black Hills in South Dakota. As long as I was with Pfeiffer or Warner.

X Q. 107. When did you last see G. A. Pfeiffer?

A. I saw Mr. G. A. Pfeiffer since I left the company. I don't remember just when it was. I think it was about two years ago in Omaha.

X Q. 108. I mean when did you last see Mr. G. A. Pfeiffer before you left the employ of his companies?

A. I had not seen Mr. G. A. Pfeiffer after the purchase of the Wm. R. Warner Co. until I left the company.

X Q. 109. Had you seen Mr. H. Pfeiffer after the purchase of the Warner Co. and before you left their employ?

A. Yes, sir.

X Q. 110. How often?

A. Well, I would not be prepared to say exactly. Two or three times. At least that many times after the purchase of the Warner Co.

X Q. 111. Does the blue print list "Groves' Document No. 3" contain substantially the drugs and preparations which you most frequently sold out of your entire line?

Mr. Bradford: Objected to as immaterial and irrelevant.

A. Well, it is the line that we pushed the hardest and I suppose most frequently sold.

(27 X Q. 112. If a druggist had asked you whether you had anything to take the place of Saratoga Ointment, Harvey, could you have told him at once what you had in your line?

Mr. Bradford: Same objection.

A. I would refer to the list in question to find the substitute preparation.

X Q. 113. Is the same thing true of Succus Alterans, Lilly?

Mr. Bradford: Same objection.

A. Yes, sir.

Cross-examination closed.

Redirect examination.

By Mr. Bradford:

R. D. Q. 114. Did you come here willingly or reluctantly?

A. I came here really reluctantly. I would like very much to have gotten out of it. It is not pleasing to me at all personally to come to be mixed up in this affair. It was only after Eli Lilly & Co. wrote to my house and sent me a copy of the letter from my house consenting that I should come, that I finally consented to come.

Deposition closed.

C. J. THURMAN.

(Cut.)

Hotel Cerro Gordo,

Operated by

The Foster Hotel Company,

Sam S. Foster,

Manager.

Mason City, Iowa, 7/18, 1915.

Mr. E. W. Bradford,
Indianapolis, Ind.

DEAR SIR:

I received the deposition yesterday and have read it over
628 carefully and — to change my answer to X Q. 85 to read:

Mr. Merner has said other things to me along the same lines as my answer to the preceding X Q. 84.

Yours very truly,

C. J. THURMAN.

Original letter received from C. J. Thurman, July 21, 1915.

[SEAL.] A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

NOTE.—At the close of the deposition of witness C. J. Thurman, the same having been taken by the Notary in shorthand, and not having been transcribed, it was agreed that the deposition might be transcribed by the Notary and forwarded to the witness for his signature at the Hotel Cerro Gordo, at Mason City, Iowa, where he stated he would be on Saturday, the 17th inst.

The deposition was accordingly written out by me, and forwarded to the witness, and was received back from the witness on July 21, 1915, with a letter in which the witness stated that he desired to change his answer X Q. 85 to read: "Mr. Merner has said other things to me along the same lines as my answer to the preceding X Q. 84."

The original letter from the witness is attached hereto.

[SEAL.] A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

Dr. CHARLES A. NOIRET, a witness called by and on behalf of the plaintiff, having been first duly sworn, deposes and says as follows, in answer to interrogatories propounded to him by counsel:

629 By Mr. Bradford:

Q. 1. Please state your name, age, residence and occupation.

A. Charles A. Noiret; 39; New Orleans, traveling salesman for H. K. Mulford Co., Philadelphia; traveling South Mississippi, South Alabama, Southwest Florida. H. K. Mulford & Co. are manufacturers of pharmaceuticals and biologicals and I act as salesman for them for these products in this territory.

Q. 2. Are you familiar with a pharmaceutical preparation known as Coco-Quinine?

A. Yes, sir.

Q. 3. Whose preparation do you recognize this to be?

A. The Lilly Co.

Q. 4. How long have you known of this preparation in the trade?

A. I have been knowing of the Coco-Quinine for nine years.

Q. 5. Do you know of a preparation called Quin-Coco?

A. Yes, sir.

Q. 6. Whose preparation is this?

A. This is supposed to be put out by Searle-Hereth Co. formerly of Chicago but now owned by the Pfeiffer Chemical Co. of St. Louis.

Q. 7. Please state anything you know of these two preparations or in what way they have been called to your attention and by whom?

A. My attention was first called to the Quin-Coco by Mr. Howard Smith who represented the Pfeiffer Chemical Co. and W. R. Warner & Co. Mr. Howard Smith stated to me that Quin-Coco was the same identical thing as Coco-Quinine, as the chemist that formerly made Coco-Quinine for Lilly was now making for Pfeiffer Chemical Co.; and in my presence, to the retail drug trade he advised them to buy it, in preference to the original of Lilly & Co. as it was
630 cheaper and would answer the same purposes as the doctors could not detect the difference. Mr. Jones representing the Pfeiffer Warner Co.'s in Alabama told me the same thing.

Mr. Rawle objects to the answer because the alleged statements of Howard Smith and Jones to the witness were not in the ordinary course of business and, therefore, not binding in any way upon defendants, and because the witness does not state what was said to him but simply gives the general impression, because the witness does not state when any such transaction or conversation occurred.

Q. 8. Please state any specific instance naming the time and place, if you remember, when Mr. Jones made such a statement to you as you have given in your last answer?

Mr. Rawle: Same objection.

A. Mr. Jones stated the same to me at Meridian, Miss., in McCorkle's drug store in the presence of Mr. McCorkle about two years ago. I used to meet him on the road every week or so. We traveled the same territory. I have heard him make the same statement frequently in different drug stores at different times.

Mr. Rawles: Same objection.

Q. 9. Can you name any other drug stores?

Mr. Rawle: Same objection.

A. Yes, I can name others. I remember Johnson's drug store at Laurel, Miss., and Williams' pharmacy at Hattiesburg, Miss.

Q. 10. Can you name any specific time or place when Mr. Howard Smith made any such statements to druggists in your presence?

A. Why, I could not exactly give the dates as we were traveling all the time and we had to make the territory every 30 days and we met regularly every 30 days, making the same route. Williams' Pharmacy, Hattiesburg, Miss.; Johnson's Pharmacy, Laurel,
631 Miss.; McCorkle's Pharmacy, Meridian, Miss. Mr. Smith traveled the same territory that Mr. Jones did.

Q. 11. What have you heard Mr. Howard Smith tell the pharmacist as to how he could dispense Quin-Coco?

A. I have heard Mr. Howard Smith mention to the druggist that when he received a prescription for Coco-Quinine, that he could dispense Quin-Coco in its place and it could not be detected.

Q. 12. What have you heard Mr. Jones say to any druggist as to how he could dispense Quin-Coco?

A. Mr. Jones mentioned to the druggist that when he received a prescription for Coco-Quinine, he could use Quin-Coco and it could not be detected and it was cheaper to use Quin-Coco than it was to use Coco-Quinine.

Q. 13. These statements were made by both Mr. Smith and Mr. Jones to the druggists at the stores above mentioned?

A. Yes, sir. In my presence and also the presence of the druggist.

Direct-examination closed.

Mr. Rawle, not waiving objections, cross-examines as follows:

X Q. 14. Were these statements made to you or the druggist?

A. They were made to the druggist in my presence.

X Q. 15. Who were you traveling for?

A. The H. K. Mulford Co. of Philadelphia.

X Q. 16. Mention the druggists in the various towns you have named.

A. Mr. McCorkle, McCorkle Drug Store at Meridian, Miss.; Mr. Johnson, of Johnson's Drug Store at Laurel, Miss., Mr. Williams, of Williams' Pharmacy at Hattiesburg, Miss.; also known as the Owls' Pharmacy.

X Q. 17. I assume that Howard Smith and Jones stated
632 in effect according to your recollection that the two products were so much alike that you could not detect the difference between them and that Quin-Coco was cheaper?

A. Yes, sir.

X Q. 18. Did you come here from New Orleans only for the purpose of testifying in this case?

A. Yes, sir. They asked me to come here and state what I knew about it and I told them I would gladly do it.

X Q. 19. Why do you say "gladly"?
A. Because I am friendly with all pharmaceutical houses?
X Q. 20. Did you get the consent of your employers?
A. No, sir.
X Q. 21. Did you come at Lilly & Co.'s expense?
A. Yes, sir.
X Q. 22. Had you been asked to testify in this case back in March or April in New Orleans?
A. No, sir.
X Q. 23. Were you there at the time?
A. No, sir; I was out on the road.
X Q. 24. How far from New Orleans?
A. Why, in March I must have been about 170 or 180 miles from New Orleans.

Mr. Bradford: At the time of taking depositions in the South, counsel for complainant had no knowledge of this witness or any information possessed by him on this subject. It was only within the last few days that such knowledge was obtained.

X Q. 25. How much of your time will it have taken before you attend to the business and get home?
A. It will take me just three days. I will lose three days.
X Q. 26. You have spent one day or two in Indianapolis?
A. One day and a night.

Cross-examination closed.

Deposition closed.

CHARLES A. NOIRET.

633 *Notice.*

Counsel for complainant notifies counsel for defendant that he will ask the Court for leave to amend the bill of complaint in order to conform with the facts as developed by the testimony, as follows:

That the manufacture of the product Quin-Coco and the adoption of the name "Quin-Coco" for such product was by the Pfeiffer Chemical Co. prior to its acquisition of the Searle & Hereth Co. and that the acts of the Searle & Hereth Co. complained of in relation to this product Quin-Coco were after it had been acquired by the said Pfeiffer Chemical Co. and that the product has been and is being manufactured by the Wm. R. Warner & Company, as well as being sold by it. Counsel for complainant will submit to counsel for defendant a formal amendment to said bill, to make it to conform to these facts, in due time. This notice is made of record in order that counsel for defendant may be fully advised of the proposed amendments prior to the beginning of the taking of his proofs.

Mr. Rawle makes no objection to such amendments.

Counsel for complainant notifies counsel for defendant that complainant now closes its prima facie proofs.

634 *Certificate.*

In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation,

vs.

WM. R. WARNER & COMPANY, a Corporation.

STATE OF INDIANA,
County of Marion, ss:

I, A. C. Rice, a Notary Public in and for the County of Marion, and State of Indiana, do hereby certify: That, pursuant to notice and agreement of counsel, I was attended at the office of Bradford & Doolittle, 1451-1455 Lemcke Annex, in the City of Indianapolis, and State of Indiana, by E. W. Bradford, Esq., on behalf of complainant and Francis Rawle, Esq., counsel for defendant, on the days and dates hereinbefore stated; that the aforenamed witnesses, A. J. Garner, C. H. Turner, John F. Whitley, C. J. Thurman and Dr. C. A. Noiret, who were of sound mind and lawful age, were by me duly sworn to testify the truth the whole truth and nothing but the truth, in the above entitled cause and that they thereupon testified as is above shown; that the depositions by the witnesses subscribed as above set forth were reduced to writing by myself and under my direction in the presence of the witnesses themselves and from their statements, and were read over by the said witnesses and subscribed by them, and that all was so done at the place above specified and at
635 the times set forth, and that said depositions were written and signed in the presence of myself and counsel for complainant, with the exception of the depositions of C. J. Thurman and Dr. C. A. Noiret, which by consent of counsel were sent to the respective witnesses for signature and were signed by them and in the case of both of these last two mentioned depositions, I first read my shorthand notes to the witnesses before they left, and they stated that such notes were correct.

I further certify that each of the above witnesses resides at a place more than one hundred miles from the place of the trial of this cause.

I further certify that the exhibits as cited, were offered in evidence and marked as specifically noted in the foregoing deposition of C. J. Thurman and that pursuant to a stipulation by counsel for the respective parties, I have delivered said exhibits to counsel for complainant to be retained and produced in accordance with the stipulation in that behalf contained.

I further certify that I am neither attorney nor counsel for any of the parties in said deposition or caption named, and am in no wise interested in the result of said cause.

Witness my hand and official seal at Indianapolis, in the State of Indiana, this 28th day of July, 1915.

[SEAL.]

A. C. RICE,
Notary Public.

My commission expires April 9, 1916.

636 In the District Court of the United States for the Eastern District of Pennsylvania.

In Equity.

No. 1355.

THE ELI LILLY AND COMPANY, a Corporation, Plaintiff,

vs.

WM. R. WARNER & COMPANY, a Corporation, Defendant.

To the Honorable Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Now comes The Eli Lilly and Company, complainant herein by its counsel, and moves this Honorable Court for leave to amend its bill of complaint and that the amendment be entered as follows:

Cancel Paragraph 9 and substitute the following in lieu thereof:

9. That during or about the summer of 1906 the said Searle & Hereth Co. was purchased by the said Pfeiffer Chemical Co. of St. Louis, Mo., or by the same parties owning the said Pfeiffer Chemical Co., and that the business of said Searle & Hereth Co. was taken over by the said Pfeiffer Chemical Co. and consolidated with or otherwise associated with the business of the said Pfeiffer Chemical Co., the manufacturing being transferred from the former laboratories of the said Searle & Hereth Co. of Chicago to the lab-
637 oratories of the said Pfeiffer Chemical Co. at 500 North Commercial Street, in the City of St. Louis, State of Missouri; that the said Pfeiffer Chemical Co. previously to this acquisition of the said Searle & Hereth Co., had carried on experiments in an effort to duplicate or imitate the said product of complainant known as Coco-Quinine and had selected "Quin-Coco" as a name for their imitation product for Coco-Quinine; that the said experiments were not at first successful but that after the acquisition of the said Searle & Hereth Co. said experiments were continued and in the Fall of 1907 they succeeded in producing a product substantially the same as Coco-Quinine in color, taste and constituent elements, although inferior in stability and in other particular details but, nevertheless, sufficiently close to an exact duplication as to be capable of being sold and used for applicant's product Coco-Quinine, without detection in many instances; that this product so produced in the laboratories of

the Pfeiffer Chemical Co. was given the name "Quin-Coco" and was put out and offered to the trade under the label of the Searle & Hereth Co., said Searle & Hereth Co., although having a separate corporate existence, being to all intents and purposes a part of the said Pfeiffer Chemical Co. and operated and controlled by the same officers and owners as said Pfeiffer Chemical Co.; that thereafter, to-wit, during the summer of 1908, as your orator has been informed, the said Pfeiffer Chemical Co. purchased and acquired ownership of the Wm. R. Warner & Co., the defendant herein, continuing the business of the said Wm. R. Warner & Co. in its original laboratories and under its original name in the City of Philadelphia and State of Pennsylvania; that the officers of the Pfeiffer Chemical Co. became the officers of the Wm. R. Warner & Co. and assumed control and management of its affairs, which control and management has remained in their hands up to the present time; that after acquiring control of the Wm. R. Warner & Co. the officers who were the same
638 officers as were in control of the Pfeiffer Chemical Co. and the Searle & Hereth Co. undertook the manufacture of a product in the laboratories of the Wm. R. Warner & Co. at Philadelphia, to be put out as a substitute for complainant's product, known as Coco-Quinine, that these efforts were not at first successful but that finally, after securing the formula from the associated St. Louis laboratories they succeeded at said Philadelphia laboratories in producing the product which here was also called "Quin-Coco" and was put out and offered to the trade under said name and under the label of the Searle & Hereth Co.; that renewed efforts were then made by defendant and by the Pfeiffer Chemical Company to push said product labeled Quin-Coco and bearing the label of the Searle & Hereth Company in the drug trade and medical profession as a substitute for your orator's product known as Coco-Quinine; that your orator is informed, and alleges the fact to be, that the said corporation the Searle & Hereth Company is no longer an active manufacturing concern but that its corporate existence is being kept alive although its business is practically merged into and combined with the business of the Pfeiffer Chemical Company of St. Louis, Missouri; that while the said product called "Quin-Coco" is put out under the Searle & Hereth label, that it is, as before alleged, actually manufactured in the laboratories of the said Pfeiffer Chemical Company in St. Louis, and the defendant's laboratories in Philadelphia, the Searle & Hereth label being used by the parties in control of said concern for purposes best known to them; that said Pfeiffer Chemical Company and the said defendant corporation, the Wm. R. Warner & Company, although separate corporations, are composed of the same stockholders and managed by the same officers and that the said defendant corporation in pushing the sale and distribution of said product called "Quin-Coco" is not only the manufacturer but
639 the distributor of its own product as well as the distributor of like product made in the St. Louis laboratories, all of which product is labeled with like labels bearing the name "Quin-Coco," and the name "Searle & Hereth" Company as the manufacturer; that the said defendant corporation, since the establishment of the

relations with the said Pfeiffer Chemical Company and the Searle & Hereth Company, as aforesaid, has by many and divers ways and schemes placed its said product on the market, representing through its agents and salesmen to the purchasing druggists and physicians that said product can be furnished in lieu of and for your orator's product Coco-Quinine when it is called for by customers, or by physicians' prescriptions; that following such instructions druggists have sold and are now selling said product called "Quin-Coco" as and for your orator's product "Coco-Quinine," and when your orator's said product is called for; that customers frequently receive said imitation product from druggists labeled with the druggist's own label but bearing the name "Coco-Quinine," the name of your orator's original product; that such methods have resulted in depriving and are now depriving your orator of large sales of its product and the consequent profit thereon, and have resulted and are resulting, further, in the deception and defrauding of the purchasers and users who in asking for Coco-Quinine, intended to purchase and expected to receive your orator's product, which they had been accustomed to use and which product had acquired an established reputation with them for its quality and medicinal characteristics; and that by said methods the said defendant corporation has, through its agents, salesmen and confederates, pushed the sale and distribution to the trade of the said product called "Quin-Coco," but largely retailed as Coco-Quinine.

640 This amendment is offered and the motion submitted pursuant to notice given defendant at the close of taking depositions in complainant's behalf on July 13th, 1915.

Respectfully submitted,

J. ADDISON ABRAMS,
Solicitor for Complainant.
E. W. BRADFORD,
Of Counsel for Complainant.

Before Dickinson, J.

Motion to amend bill of complaint allowed.
By the Court,
Attest:

GEORGE BRODBECK,
Deputy Clerk.
August 2, 1915.